NEW CENTURY, NEW PROCESS: A PREVIEW OF COMPETITIVE SOURCING FOR THE 21ST CENTURY

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

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NEW CENTURY, NEW PROCESS: A PREVIEW OF COMPETITIVE SOURCING FOR THE 21ST CENTURY

THURSDAY, JUNE 26, 2003

HOUSE OF REPRESENTATIVES,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The committee met, pursuant to notice, at 9:35 a.m., in room 2154, Rayburn House Office Building, Hon. Tom Davis (chairman of the committee) presiding.

Present: Representatives Tom Davis of Virginia, Shays, Ose, Jo Ann Davis of Virginia, Duncan, Waxman, Maloney, Kucinich, Tierney, Watson, Van Hollen, Ruppersberger, Norton and Cooper.

Staff present: Melissa Wojciak, deputy staff director; Keith Ausbrook, chief counsel; Ellen Brown, legislative director and senior policy counsel; Randall Kaplan, counsel; Robert Borden, counsel/parliamentarian; David Marin, director of communications; Scott Kopple, deputy director of communications; Mason Alinger, professional staff member; John Brosnan, GAO detailee; Teresa Austin, chief clerk; Joshua E. Gillespie, deputy clerk; Corrine Zacagnini, chief information officer; Phil Barnett, minority chief counsel; Michelle Ash, minority counsel; Mark Stephenson, minority professional staff member; Earley Green, minority chief clerk; Jean Gosa, minority assistant clerk; and Cecelia Morton, minority office manager.

Mr. SHAYS [presiding]. Good morning.

We are here today to examine recently issued revisions to Office of Management and Budget's Circular A–76, the Federal Government's competitive sourcing process. The administration promulgated these revisions on May 29, 2003.

This is the first major overhaul of the A–76 process in 20 years. These revisions are the product of a 2-year effort that included discussions and negotiations with all stakeholders as well as a formal public notice and comment period.

For almost 50 years it has been the policy of the Federal Government to look to the private sector to supply products and services whenever possible. The A–76 Circular was first adopted in 1966 to formalize the policy requiring government purchasers to compare the cost of in-house performance by an agency with the cost of performance by the private sector.

Despite this Circular's long history, A–76 cost comparisons have not been widely used by Federal departments and agencies. While the Department of Defense has used the guidelines to compete

functions ranging from computer services to commissary operations, few other agencies have used the process. Circular A–76 has been criticized over the years as being time-consuming, expensive, and unnecessarily complicated, which has discouraged Federal managers from using it.

Recognizing that the A–76 process was flawed, Congress created the Commercial Activities Panel, chaired by the Comptroller General, to study the government's competitive sourcing policies. The panel included representatives from government agencies, Federal labor unions, private industry and academia.

The revised Circular under discussion today extensively modifies the old process, following some but not all Commercial Activities Panel recommendations.

Under the old rules, commercial activities for which contractors and Federal employees competed were awarded to the entity that offered the lowest cost to the government to perform the work. The comparison involved a two-step process in which the private sector price to perform the work was determined by competition. Then the winning bid was compared to an estimate of the cost of in-house performance by the government.

The new rules, by contrast, provide for a one-step process in which all sources, including Federal employee units, can submit offers and compete for commercial activities at the same time. Although in most instances the work will be awarded to the lowest-cost provider, in some limited cases agencies may award a contract using a best-value methodology which allows a contract award to be decided on factors other than cost alone.

The revised Circular also eliminates most direct conversions, a process in which Federal tasks performed by 10 or fewer employees could be outsourced to private companies without competition. Instead, the revised Circular A–76 permits a streamlined competition process for jobs involving 65 or fewer Federal employees.

The new guidelines also set strict timeframes for completion of competitions. Streamlined competitions must be completed within 90 days, while standard competitions will normally take 12 months.

The bottom line when it comes to public-private competitions is get the best value for taxpayers. The revisions to the A–76 process are a positive change that will result in real savings and greater efficiencies in government operations. The revisions are also central to the administration's Competitive Sourcing Initiative, a key element of the President's Management Agenda.

We have assembled excellent panels of witnesses who will discuss these important issues. On behalf of Chairman Davis, I thank each of them for appearing today.

[The prepared statement of Chairman Tom Davis follows:]

Statement of Chairman Tom Davis
Government Reform Committee Hearing
"New Century, New Process: A Preview of
Competitive Sourcing for the 21st Century"
Thursday, June 26, 2003

Good morning, a quorum being present, the Committee on Government Reform will come to order. We are here today to examine the Administration's recently issued revisions to Office of Management and Budget Circular A-76, the federal government's competitive sourcing process. The Administration unveiled these revisions on May 29, 2003.

The revisions represent the first major overhaul to the A-76 process in twenty years. They are the product of a two-year effort that included discussions and negotiations with all stakeholders as well as a formal public notice and comment period.

For almost fifty years, it has been the policy of the federal government to rely on the private sector to supply its products and services, whenever possible. The A-76 Circular was first adopted in 1966 to formalize this policy, and required the government to conduct a comparison between the cost of performance by an agency and the cost of performance by the private sector.

Despite the Circular's long history, A-76 cost comparisons have not been widely used by federal departments and agencies. While the Department of Defense has used the guidelines to compete functions ranging from computer services to commissary operations, few other agencies have used the process. Circular A-76 has been criticized over the years as being time consuming, expensive, and unnecessarily complicated, which has discouraged federal managers from using it.

Recognizing that the A-76 process was flawed, Congress enacted legislation to create a panel of experts to study the government's competitive sourcing policies. This group of experts, called the Commercial Activities Panel, was chaired by the Comptroller General and included representatives from government agencies, federal labor unions, private industry, and academia.

The revised Circular that is the subject of today's hearing extensively modifies the old process, following some, but not all of the recommendations of the Commercial Activities Panel. Under the old rules, commercial activities for which contractors and federal employees competed were awarded to the entity that offered the lowest cost to the government to perform the work. The comparison involved a two-step process where the price to perform the work by the winner of a competition among private companies was compared with an estimate of the cost of performance by the government.

The new rules, by contrast, provide for a one-step process, where all sources, including federal employees, can submit offers and compete for commercial activities at the same time. Although in most instances the work will be awarded to the lowest cost provider, in some limited cases, agencies may award a contract using a "best value" methodology, which allows competition to be decided on factors other than cost.

The revised Circular also eliminates most direct conversions, a process in which federal tasks performed by 10 or fewer federal employees could be outsourced to private companies without competition. Instead of direct conversions, the revised Circular A-76 permits a streamlined competition process for jobs involving 65 or fewer federal employees.

The new guidelines also set strict timeframes for completion of competitions. Streamlined competitions must be completed within 90 days, while standard competitions will normally take 12 months.

I have repeatedly stated that the federal government's ultimate objective when it comes to public-private competitions should be to pursue the best value for taxpayers. I think that the revisions to the A-76 process are a positive change that will result in savings of taxpayer dollars and greater efficiencies in government operations. The revisions are also central to facilitating the Administration's competitive sourcing initiative, which is one of the priorities outlined in the President's Management Agenda.

We have assembled excellent panels of witness who will discuss these important issues. I would like to thank each of our witnesses for appearing today.

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Mr. SHAYS. We will I think introduce the witnesses, and I think Mr. Waxman will be on his way. So let me at this point recognize our panel and swear them in.

The Honorable David Walker, Comptroller General of the United States and head of the General Accounting Office; the Honorable Angela Styles, Director of the Office of Federal Procurement Policy at the Office of Management and Budget; Mr. Philip Grone, the Principal Assistant Deputy Under Secretary of Defense for Installations and Environment at the Department of Defense; and Mr. Scott Cameron, Deputy Assistant Secretary for Performance and Management at the Department of Interior.

I think, as you know, it is the policy of the committee that all witnesses be sworn in before they testify. So we'll have you stand up, and we'll swear you in. Raising your right hands, please.

[Witnesses sworn.]

Mr. SHAYS. Note for the record our witnesses have responded in the affirmative.

I think what we'll do is start with you, Mr. Walker. If Mr. Waxman arrives, then I think, before we go into the next, we'll make sure we hear from him.

So you have the floor.

STATEMENTS OF DAVID M. WALKER, COMPTROLLER GENERAL, U.S. GENERAL ACCOUNTING OFFICE; ANGELA STYLES, DIRECTOR, OFFICE OF FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET; PHILIP GRONE, PRINCIPAL ASSISTANT DEPUTY UNDER SECRETARY OF DEFENSE FOR INSTALLATIONS AND ENVIRONMENT, DEPARTMENT OF DEFENSE; AND SCOTT J. CAMERON, DEPUTY ASSISTANT SECRETARY FOR PERFORMANCE AND MANAGEMENT, DEPARTMENT OF THE INTERIOR

Mr. WALKER. Thank you very much for the opportunity to appear today to discuss the Office of Management and Budget's revised Circular A–76. If I can, Mr. Chairman, I would like for my entire statement to be included in the record. It's fairly extensive, and I'd like to make just a few highlight comments now if I can.

Mr. SHAYS. Yes, please do that.

Mr. WALKER. Thank you very much.

This is an important, complex and somewhat controversial topic. As you pointed out, Mr. Chairman, because of the importance complexity, and controversy associated with the entire issue of sourcing strategy in general and competitive sourcing in particular, including A–76, the Congress by law enacted legislation that required the creation of a Commercial Activities Panel, which I had the—I don't know if it is the privilege, but I had the obligation to chair and took it very seriously.

It was an extensive effort. It involved a number of public hearings, a diverse group of—and highly qualified parties as members of the panel, including several witnesses here today.

After that extensive process, the panel unanimously agreed, as you know, to 10 sourcing principles that should guide all sourcing policy. That was unanimous. Furthermore, a supermajority—but not unanimous by any means—a supermajority of the panel also agreed to certain other supplemental recommendations dealing

with the proposal to create a streamlined, FAR-based process as a supplement to, not a substitute for, A–76 and also the need to look at how we can promote high-performing organizations throughout government and not rely on competitive sourcing as our primary means of trying to achieve economy, efficiency and effectiveness, given that a vast majority of the Federal Government will never be subject to competitive sourcing.

I think it's important to note that while we're still reviewing the final A–76 Circular, that in general GAO's view is that it is generally consistent with the Commercial Activities Panel sourcing principles and recommendations. We do have certain concerns.

For example, as anything goes, you can have a perfect policy, but how it is implemented is absolutely key. We're particularly interested in trying to get a sense as to how these streamlined cost comparisons for under 65 might be handled in actual practice. The panel did talk about having to restrict direct conversions to a de minimus amount of 10 FTEs or less. Time will tell whether these streamlined cost comparisons will end up occurring.

We had some concerns about the reasonableness of the timeframes. I know that OMB was responsive to note that they are not hard and fast timeframes, but I think in that regard it is going to be critically important that Federal agencies have adequate financial and technical resources available in order to assure that Federal employees will be able to compete fairly and effectively in connection with any competitions.

We continue to have concerns with the need for enhanced cost data for both the winners that might be in the public sector as well as the private sector, and we're concerned about more details being needed for high-performing organizations, if you will.

But, in general, as I said, it appears in design that what OMB has done is generally consistent with the Commercial Activities Panel recommendations subject to those comments.

I would also like to, if I can for the record, Mr. Chairman, be able to refer to a couple of things that one of the subsequent panel members will be testifying to, namely, it is true that the Commercial Activities Panel did talk about retaining a 10 percent cost differential on A–76 competitions as well as major competitions.

Second, it is untrue that GAO is the biggest booster of best value.

And, third, for the record, what I would like to state is that about a year ago I received a call from several Senators and Members of Congress on both sides of the aisle who asked my view about a legislative provision that was being considered by the Congress at that point in time. I provided my views to those Members, basically stating that I did not believe that arbitrary goals or quotas were appropriate. I felt that the initial 15 percent and 50 percent targets for the administration were arbitrary and therefore not appropriate.

However, I also felt that it was possible to be able to come up with a considered approach by reviewing past activity, by looking at, on a more considered basis, to come up with some type of a number that would be based upon a considered review and analysis, and I didn't believe that it would be appropriate to say that was per se improper by law. And so, as a result, I stand by what

I did, and Congress evidently felt that it was valuable and acted accordingly.

So, with that, Mr. Chairman, I think this is an important topic. I look forward to respond to any questions that you and other members of the committee may have subsequent to hearing from the other panel members. Thank you.

Mr. SHAYS. Thank you.

[The prepared statement of Mr. Walker follows:]

United States General Accounting Office

GAO

Testimony
Before the Committee on Government Reform, House of Representatives

For Release on Delivery
Expected at 10:00 a.m. EDT
Thursday, June 26, 2003

COMPETITIVE SOURCING

Implementation Will Be Key to Success of New Circular A-76

Statement of David M. Walker
Comptroller General of the United States

GAO-03-943T

June 26, 2003

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Highlights

Highlights of GAO-03-943T, a testimony before the House Committee on Government Reform

COMPETITIVE SOURCING

Implementation Will Be Key to Success of New Circular A-76

Why GAO Did This Study

In May 2003, the Office of Management and Budget (OMB) issued a new Circular A-76—which sets forth the government's competitive sourcing process. Determining whether to obtain services in-house or through commercial contracts is an important economic and strategic decision for agencies, and the use of A-76 is expected to grow throughout the federal government.

In the past, however, the A-76 process has been difficult to implement, and the impact on the morale of the federal workforce has been profound. Moreover, there have been concerns in both the public and private sectors about the timeliness and fairness of the process and the extent to which there is a "level playing field" for conducting public-private competitions.

It was against this backdrop that the Congress enacted legislation mandating a study of the government's competitive sourcing process, which was carried out by the Commercial Activities Panel, which was chaired by the Comptroller General of the United States.

This testimony focuses on how the new Circular addresses the Panel's recommendations with regard to providing a better foundation for competitive sourcing decisions, and the challenges agencies may face in implementing the new A-76.

www.gao.gov/cgi-bin/getrpt?GAO-03-943T.

To view the full product, including the scope and methodology, click on the link above. For more information, contact William T. Woods at (202) 512-8214, or woodsw@gao.gov.

What GAO Found

Overall, the new Circular is generally consistent with the principles and recommendations that the Commercial Activities Panel reported in April 2002, and should provide an improved foundation for competitive sourcing decisions in the federal government. In particular, the new Circular permits greater reliance on procedures in the Federal Acquisition Regulation—which should result in a more transparent and consistently applied competitive process—as well as source selection decisions based on tradeoffs between technical factors and cost. The new Circular also suggests potential use of alternatives to the competitive sourcing process, such as public-private and public-public partnerships and high-performing organizations.

Guiding Principles for Sourcing Policy

Federal sourcing policies should:

1. Support agency missions, goals, and objectives.
2. Be consistent with human capital practices designed to attract, motivate, retain, and reward a high-performing federal workforce.
3. Recognize that inherently governmental and certain other functions should be performed by federal workers.
4. Create incentives and processes to foster high performing, efficient, and effective organizations throughout the federal government.
5. Be based on a clear, transparent, and consistently applied process.
6. Avoid arbitrary full-time equivalent or other arbitrary numerical goals.
7. Establish a process that, for activities that may be performed by either the public or the private sector, would permit public and private sources to participate in competitions for work currently performed in-house, work currently contracted to the private sector, and new work, consistent with these guiding principles.
8. Ensure that, when competitions are held, they are conducted as fairly, effectively, and efficiently as possible.
9. Ensure that competitions involve a process that considers both quality and cost factors.
10. Provide for accountability in connection with all sourcing decisions.

The new Circular should result in increased savings, improved performance, and greater accountability. However, this initiative is a major change in the way the government operates, and implementing the new Circular A-76 will likely be challenging for many agencies. A major challenge agencies will face will be meeting a 12-month limit for completing the standard competition process. This provision aims to respond to complaints about the length of time taken to conduct A-76 cost comparisons. However, GAO studies of competitive sourcing at the Department of Defense (DOD) have found that competitions can take much longer than 12 months. Other provisions in the new Circular may also prove burdensome in implementation.

Lessons learned by DOD and other agencies as they initiate efforts to improve acquisition, human capital, and information technology management could prove invaluable as agencies implement the new A-76 provisions—especially those that demonstrate best competitive sourcing practices. Successful implementation of the Circular's provisions will also likely require additional financial and technical support and incentives.

Chairman Davis, Ranking Member Waxman, and Members of the Committee:

I am pleased to be here today to participate in the Committee's hearing on the Office of Management and Budget's (OMB) revised Circular A-76. The revisions to the Circular, released May 29, 2003, represent the most comprehensive set of changes to the rules governing the competitive sourcing of commercial services in the federal government since the initial Circular A-76 was issued in 1966.

Today's hearing occurs at a critical and challenging time for federal agencies. Agencies are responding to an environment in which new security threats, demographic changes, rapidly evolving technologies, increased pressure for demonstrable results, and serious and growing fiscal imbalances demand that the federal government engage in a fundamental review, reassessment, and reprioritization of its missions and operations. Federal agencies are increasingly relying on enhanced technology and a range of technical and support services to accomplish their missions. Consequently, it is important for agencies to consider how best to acquire and deliver such capabilities—including, in some cases, who the service provider should be.

Determining whether to obtain services in-house, through contracts with the private sector, or through a combination of the two—in other words, through insourcing, outsourcing, or, in some cases, co-sourcing—is an important economic and strategic decision for agency managers. In the past, however, the government's competitive sourcing process—set forth in OMB Circular A-76—has been difficult to implement. The impact of the A-76 process on the morale of the federal workforce has been profound, and there have been concerns in both the public and private sectors about the timeliness and fairness of the process and the extent to which there is a "level playing field" for conducting public-private competitions. While Circular A-76 competitions historically have represented only a small portion of the government's service contracting dollars, competitive sourcing is expected to grow throughout the federal government.

It was against this backdrop that the Congress enacted legislation mandating a study of the government's competitive sourcing process.[1] This

[1]Section 832, Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, P.L.106-398 (Oct. 30, 2000).

study was carried out by the Commercial Activities Panel, which I chaired. My comments today will focus on how the new Circular addresses the Panel's recommendations with regard to providing a better foundation for competitive sourcing decisions and the challenges agencies may face in implementing the new A-76. I will also highlight an important issue involving the protest process under the new Circular.

New Circular Provides an Improved Foundation for Competitive Sourcing Decisions

Following a yearlong study, the Commercial Activities Panel in April 2002 reported its findings on competitive sourcing in the federal government. The report lays out 10 sourcing principles and several recommendations, which provide a roadmap for improving sourcing decisions across the federal government. Overall, the new Circular is generally consistent with these principles and recommendations.

The Commercial Activities Panel held 11 meetings, including three public hearings in Washington, D.C.; Indianapolis, Indiana; and San Antonio, Texas. In these hearings, the Panel heard repeatedly about the importance of competition and its central role in fostering economy, efficiency, and continuous performance improvement. Panel members heard first-hand about the current process—primarily the cost comparison process conducted under OMB Circular A-76—as well as alternatives to that process. Panel staff conducted extensive additional research, review, and analysis to supplement and evaluate the public comments. Recognizing that its mission was complex and controversial, the Panel agreed that a supermajority of two-thirds of the Panel members would have to vote for any finding or recommendation in order for it to be adopted. Importantly, the Panel unanimously agreed upon a set of 10 principles it believed should guide all administrative and legislative actions in competitive sourcing. The Panel itself used these principles to assess the government's existing sourcing system and to develop additional recommendations.

Guiding Principles for Sourcing Policy

Federal sourcing policies should:

1. Support agency missions, goals, and objectives.
2. Be consistent with human capital practices designed to attract, motivate, retain, and reward a high-performing federal workforce.
3. Recognize that inherently governmental and certain other functions should be performed by federal workers.
4. Create incentives and processes to foster high performing, efficient, and effective organizations throughout the federal government.
5. Be based on a clear, transparent, and consistently applied process.
6. Avoid arbitrary full-time equivalent or other arbitrary numerical goals.
7. Establish a process that, for activities that may be performed by either the public or the private sector, would permit public and private sources to participate in competitions for work currently performed in-house, work currently contracted to the private sector, and new work, consistent with these guiding principles.
8. Ensure that, when competitions are held, they are conducted as fairly, effectively, and efficiently as possible.
9. Ensure that competitions involve a process that considers both quality and cost factors.
10. Provide for accountability in connection with all sourcing decisions.

A supermajority of the Panel agreed on a package of additional recommendations. Chief among these was a recommendation that public-private competitions be conducted using the framework of the Federal Acquisition Regulation (FAR). Although a minority of the Panel did not support the package of additional recommendations, some of these Panel members indicated that they supported one or more elements of the package, such as the recommendation to encourage high-performing organizations (HPO) throughout the government. Importantly, there was a good faith effort to maximize agreement and minimize differences among Panel members. In fact, changes were made to the Panel's report and recommendations even when it was clear that some Panel members seeking changes were highly unlikely to vote for the supplemental package of recommendations. As a result, on the basis of Panel meetings and my personal discussions with Panel members at the end of our deliberative process, I believe the major differences among Panel members were few in number and philosophical in nature. Specifically, disagreement centered primarily on (1) the recommendation related to the role of cost in the new FAR-type process, and (2) the number of times the Congress should be required to act on the new FAR-type process, including whether the Congress should authorize a pilot program to test that process for a specific time period.

As I noted previously, the new A-76 Circular is generally consistent with the Commercial Activities Panel's sourcing principles and recommendations and, as such, provides an improved foundation for competitive sourcing

decisions in the federal government. In particular, the new Circular permits:

- greater reliance on procedures contained in the FAR, which should result in a more transparent, simpler, and consistently applied competitive process, and
- source selection decisions based on tradeoffs between technical factors and cost.

The new Circular also suggests potential use of alternatives to the competitive sourcing process, such as public-private and public-public partnerships and high-performing organizations. It is not, however, specific as to how and when these alternatives might be used.

If effectively implemented, the new Circular should result in increased savings, improved performance, and greater accountability, regardless of the service provider selected. However, this competitive sourcing initiative is a major change in the way government agencies operate, and successful implementation of the Circular's provisions will require that adequate support be made available to federal agencies and employees, especially if the time frames called for in the new Circular are to be achieved.

Ultimate Success of Competitive Sourcing Will Depend on How It Is Implemented

Implementing the new Circular A-76 will likely be challenging for many agencies. GAO's past work on the competitive sourcing program at the Department of Defense (DOD)— as well as agencies' efforts governmentwide to improve acquisition, human capital, and information technology management—has identified practices that have either advanced these efforts or hindered them. The lessons learned from these experiences—especially those that demonstrate best competitive sourcing practices—could prove invaluable to agencies as they implement the provisions in the new Circular.

A major challenge agencies will face will be meeting a 12-month limit for completing the standard competition process in the new Circular. This provision is intended to respond to complaints from all sides about the length of time taken to conduct A-76 cost comparisons—complaints that the Panel repeatedly heard in the course of its review. OMB's new Circular states that standard competitions shall not exceed 12 months from public announcement (start date) to performance decision (end date). Under certain conditions, there may be extensions of no more than 6 months. The new Circular also states that agencies shall complete certain

preliminary planning steps before a public announcement. We welcome efforts to reduce the time required to complete these studies. Even so, our studies of DOD competitive sourcing activities have found that competitions can take much longer than the time frames outlined in the new Circular. Specifically, DOD's most recent data indicate that competitions take on average 25 months. It is not, however, clear how much of this time was needed for any planning that may now be outside the revised Circular's time frame. In commenting on OMB's November 2002 draft proposal, we recommended that the time frame be extended to perhaps 15 to 18 months overall, and that OMB ensure that agencies provide sufficient resources to comply with A-76. In any case, we believe additional financial and technical support and incentives will be needed for agencies as they attempt to meet these ambitious time frames.

Another provision in the new Circular that may affect the timeliness of the process is the "phased evaluation" approach—one of four approaches for making sourcing selections. Under this approach, an agency evaluates technical merit and cost in two separate phases. In the first phase, offerors may propose alternate performance standards. If the agency decides that a proposed alternate standard is desirable, it incorporates the standard into the solicitation. All offerors may then submit revised proposals in response to the new standard. In the second phase, the agency selects the offeror who meets these new standards and offers the lowest cost. While not in conflict with the principles or recommendations of the Commercial Activities Panel, the approach, if used, may prove burdensome in implementation, given the additional step involved in the solicitation.

DOD's Competitive Sourcing Lessons Provide Insight for Civilian Agencies

DOD has been at the forefront of federal agencies in using the A-76 process. We have tracked DOD's progress in implementing its A-76 program since the mid-to-late-1990s and have identified a number of challenges that hold important lessons that civilian agencies should consider as they implement their own competitive sourcing initiatives.[2] Notably:

- competitions took longer than initially projected,

[2] U.S. General Accounting Office, *Competitive Sourcing: Challenges in Expanding A-76 Governmentwide*, GAO-02-498T (Washington, D.C.: Mar. 6, 2003).

- costs and resources required for the competitions were underestimated,
- selecting and grouping functions to compete was problematic, and
- determining and maintaining reliable estimates of savings was difficult.

DOD's experience and our work identifying best practices[3] suggest that several key areas will need sustained attention and communication by senior leadership as agencies plan and implement their competitive sourcing initiatives.

- Basing goals and decisions on sound analysis and integrating sourcing with other management initiatives. Sourcing goals and targets should contribute to mission requirements and improved performance and be based on considered research and sound analysis of past activities. Agencies should consider how competitive sourcing relates to strategic management of human capital, improved financial performance, expanded reliance on electronic government, and budget and performance integration, consistent with the President's Management Agenda.
- Capturing and sharing knowledge. The competition process is ultimately about promoting innovation and creating more economical, efficient, and effective organizations. Capturing and disseminating information on lessons learned and providing sufficient guidance on how to implement policies will be essential if this is to occur. Without effectively sharing lessons learned and sufficient guidance, agencies will be challenged to implement certain A-76 requirements. For example, calculating savings that accrue from A-76 competitions, as required by the new Circular, will be difficult or may be done inconsistently across agencies without additional guidance, which will contribute to uncertainties over savings.

[3] U.S. General Accounting Office, *Best Practices: Taking A Strategic Approach Could Improve DOD's Acquisition of Services*, GAO-02-230 (Washington, D.C.: Jan. 18, 2002); U.S. General Accounting Office, *Information Technology: DOD Needs to Leverage Lessons Learned from Its Outsourcing Projects*, GAO-03-37 (Washington, D.C.: Apr. 25, 2003); U.S. General Accounting Office, *A Model of Strategic Human Capital Management*, GAO-02-373SP (Washington, D.C.: Mar. 15, 2002); U.S. General Accounting Office, *Acquisition Workforce: Status of Agency Efforts to Address Future Needs*, GAO-03-55 (Washington, D.C.: Dec. 18, 2002).

- Building and maintaining agency capacity. Conducting competitions as fairly, effectively, and efficiently as possible requires sufficient agency capacity—that is, a skilled workforce and adequate infrastructure and funding. Agencies will need to build and maintain capacity to manage competitions, to prepare the in-house most-effective organization (MEO), and to oversee the work—regardless of whether the private sector or the MEO is selected. Building this capacity will likely be a challenge, particularly for agencies that have not been heavily invested in competitive sourcing previously. An additional challenge facing agencies in managing this effort will be doing so while addressing high-risk areas, such as human capital and contract management. In this regard, GAO has listed contract management at the National Aeronautics and Space Administration, the Department of Housing and Urban Development, and the Department of Energy as an area of high risk. With a likely increase in the number of public-private competitions and the requirement to hold accountable whichever sector wins, agencies will need to ensure that they have an acquisition workforce sufficient in numbers and abilities to administer and oversee these arrangements effectively.

We recently initiated work to look at how agencies are implementing their competitive sourcing programs. Our prior work on acquisition, human capital, and information technology management—in particular, our work on DOD's efforts to implement competitive sourcing—provides a strong knowledge base from which to assess agencies' implementation of this initiative.

Protest Rights of In-house Competitors

Finally, an important issue for implementation of the new Circular A-76 is the right of in-house competitors to appeal sourcing decisions in favor of the private sector. The Panel heard frequent complaints from federal employees and their representatives about the inequality of protest rights. While both the public and the private sectors had the right under the earlier Circular to file appeals to agency appeal boards, only the private sector had the right, if dissatisfied with the ruling of the agency appeal board, to file a bid protest at GAO or in court. Under the previous version of the Circular, both GAO and the Court of Appeals for the Federal Circuit held that federal employees and their unions were not "interested parties" with the standing to challenge the results of A-76 cost comparisons.

The Panel recommended that, in the context of improving to the federal government's process for making sourcing decisions, a way be found to level the playing field by allowing in-house entities to file a protest at GAO,

as private-sector competitors have been allowed to do. The Panel also viewed the protest process as one method of ensuring accountability to assure federal workers, the private sector, and the taxpayer that the competition process is working properly.

The new Circular provides a right to "contest" a standard A-76 competition decision using procedures contained in the FAR for protests within the contracting agencies. The new Circular thus abolishes the A-76 appeal board process and instead relies on the FAR-based agency-level protest process. An important legal question is whether the shift from the cost comparisons under the prior Circular to the FAR-like public-private competitions under the new one means that the in-house MEO should be eligible to file a bid protest at GAO. If the MEO is allowed to protest, there is a second question: Who will speak for the MEO and protest in its name? To ensure that our legal analysis of these questions benefits from input from everyone with a stake in this important area, GAO posted a notice in the Federal Register on June 13, seeking public comment on these and several related questions. Responses are due by July 16, and we intend to review them carefully before reaching our legal conclusion.

Conclusion

While the new Circular provides an improved foundation for competitive sourcing decisions, implementing this initiative will undoubtedly be a significant challenge for many federal agencies. The success of the competitive sourcing program will ultimately be measured by the results achieved in terms of providing value to the taxpayer, not the size of the in-house or contractor workforce or the number of positions competed to meet arbitrary quotas. Successful implementation will require adequate technical and financial resources, as well as sustained commitment by senior leadership to establish fact-based goals, make effective decisions, achieve continuous improvement based on lessons learned, and provide ongoing communication to ensure federal workers know and believe that they will be viewed and treated as valuable assets.

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Mr. Chairman, this concludes my statement. I will be happy to answer any questions you or other Members of the Committee may have.

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Mr. SHAYS. Ms. Styles, before recognizing you, we've been joined by two Members. They may have opening statements. Mr. Ose and Mr. Ruppersberger. Mr. Ose, do you have an opening statement?

Mr. OSE. I do, Mr. Chairman.

Mr. SHAYS. If you don't mind, we're going to kind of go to Members now. Mr. Ose.

Mr. OSE. Thank you, Mr. Chairman.

As a member of this committee and a former owner of various small businesses, I am happy to be participating today in this hearing on the administration's new competitive sourcing policy, which was issued by OMB on May 29, 2003.

Mr. Chairman, in the interest of time, I'm going to abbreviate my remarks and submit my full statement for the record. I will say that, subsequent to the November issuance of the proposed policy change, I've had my staff looking at any number of things, not the least of which was the impact on identifying the number of jobs, if you will, that would fall in the commercial inventory focused on California.

We focused on the seven functions, with over 1,000 employees each in California and we've analyzed six of them. We have used the threshold of 100, as opposed to 65 positions. In sum, the analysis indicates that, in California alone, in those six function areas, there's about 3,500 slots available for commercial consideration in nursing services at the Department of Veterans Affairs; 1,704 in medical services at DVA, Department of Veterans Affairs; 1,582 in the Defense storage and warehousing function; 1,240 in the Agriculture Department's fire prevention and protection function; 1,168 in the Defense commissary operations; and 1,019 in the Treasury Department data processing services.

This just gives you some sense of the scope of what this particular proposal may envision. In total, there were 32,284 commercial jobs performed by Federal employees at nine Federal agencies in California, according to the analysis my staff did. This is an opportunity for us to take a hard look at what these positions offer and to try on focus government's role.

I look forward to the testimony from our witnesses today. I think this is a great step in the right direction. I appreciate the time.

Mr. SHAYS. Thank you, Mr. Ose.

[The prepared statement of Hon. Doug Ose follows:]

Record

Opening Statement of Subcommittee Chairman Doug Ose
"New Century, New Process: A Preview of Competitive Sourcing for the 21st Century"
June 26, 2003

As a Member of this Committee and a former owner of various small businesses, I am happy to be participating in today's hearing on the Administration's new "competitive sourcing" policy, which was issued by the Office of Management and Budget (OMB) on May 29, 2003. I am pleased that OMB made certain changes in response to public comments on its November 19, 2002 proposed policy change. OMB removed the presumption that "all activities are commercial in nature unless an activity is justified as inherently governmental" and eliminated direct conversions when 10 or fewer Federal employees were involved.

I support OMB's efforts to reduce the timeframe for public-private competitions. OMB's final policy provides 12 months (with a 6-month extension possible) for regular competitions, and 90 days (with a 45-days extension possible) for streamlined competitions. Previous competitions took too long and acted as a discouragement for private sector participation. The result is expected to be substantial dollars saved in the performance of commercial functions by either competitive Federal agency "in-house" offers or better value private sector offers.

I also support OMB's threshold of 65 or fewer Federal employees for streamlined competitions and its procedures for this easier process, including no addition of a 10 percent "conversion differential" to private sector offers (as is required for regular competitions involving over 65 Federal employees) and no ability for possibly lengthy appeals. The new streamlined competition process should encourage more private sector participation. I believe that the American people deserve to pay the minimum necessary for the delivery of commercial services.

I encourage OMB to ensure that Federal agencies fully train their employees so that in-house offers are competently prepared. In addition, I encourage OMB to review agency regulations that may inhibit private sector involvement. Last week, I became aware of such a regulation (36 CFR Part 1228 Subpart K) issued in 1999 by the National Archives and Records Administration.

On April 30, 2003, I asked all 102 agencies with OMB-approved inventories to provide me with a copy of their most recent "commercial" activities inventory. My staff analyzed these submissions, focusing on Federal jobs that could be potentially privatized in the State of California. The staff analyzed only function codes with 100 or more employees. They found a total of 32,284 commercial jobs performed by Federal employees in nine Federal agencies in California: Agriculture, Defense, Interior, Justice, Transportation, Treasury, Veterans Affairs (DVA), the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA).

Six of the seven functions with over 1,000 employees each in California included: 3497 Nursing Services (DVA), 1704 Medical Services (DVA), 1582 Storage and Warehousing (Defense), 1240 Fire Prevention and Protection (Agriculture), 1168 Commissary Operations (Defense), and 1019 Data Processing Services (Treasury). I believe that Americans would benefit from public-private competitions for all of these commercial activities.

I ran on a good government platform. I promised to see that Federal funds are spent more cost-effectively. This new process should help.

Mr. SHAYS. Mr. Ruppersberger.
Mr. RUPPERSBERGER. I have no statement.
Mr. SHAYS. Mr. Van Hollen, do you have any——
Mr. VAN HOLLEN. No.
Mr. SHAYS. Thank you both for being here.

Let me just deal with unanimous consent before we get to you, Ms. Styles. I ask unanimous consent that members and witnesses shall have 5 days to submit written statements for the record; and obviously any abbreviations of your own statements will be submitted in the record if you choose to speak orally. That will obviously be a part of the record as well.

Also, I ask unanimous consent to insert into the record a statement from Elwood Hampton, ITPE vice president, and without objection, so ordered.

[The prepared statement of Mr. Hampton follows:]

INDUSTRIAL, TECHNICAL & PROFESSIONAL EMPLOYEES UNION (ITPE)

Affiliated with OPEIU-AFL-CIO as Local 4873

ITPEU (AFL-CIO)

1325 Massachusetts Ave., NW • Washington DC 20005

202-628-5770

June 26, 2003

The Honorable Tom Davis
Chairman
Committee on Government Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515-8143

Dear Chairman Davis:

The Industrial Technical Professional Employee's Union (Affiliated as Local 4873 with OPEIU-AFL-CIO is pleased to submit these comments for your hearing to examine the revisions of Office of Management and Budget Circular A-76.

The ITPE represents through the Collective Bargaining Agreements approximately 10,000 members employed at more than 260 contract sites located in the U.S., Alaska, Hawaii, Puerto Rico and Guam. ITPE's members represent a diverse cross section of industries including food service, information technology, security, healthcare, custodial, laundry, warehousing, refuse and maintenance. The skills represented by ITPE's membership working on government service contracts are commercial in nature and are common in both the private and public sectors.

Members of ITPE working on government contracts benefit from their union representation through collective bargaining. Bargaining results in fair wages and benefits agreed to by ITPE and the contractor and then reviewed by the government. The Service Contract Act

results in fair wages and benefits agreed to by ITPE and the contractor and then reviewed by the government. The Service Contract Act requires that collective bargaining agreements be negotiated between the union and the contractor at arms length and result in rates that are not at variance for those occupations in the locality. Besides wages and fringe benefits, bargaining also addresses leave, disciplinary procedures, grievance arbitration, training and other issues. Employee training opportunities are just one of the benefits provided to ITPE members as these programs are designed to improve the skills of existing members working in private sector as well as developing new ones for the future.

In general, ITPE believes that the new A-76 is a more accountable, transparent and fair process for both the public and private sectors. Nevertheless, ITPE has a limited number of comments concerning the revised A-76. These comments primarily focus on the impact to ITPE members and strive to ensure there is equity throughout the process. ITPE's comments include:

1.) ITPE members represent a value added to the contractor and their government agency customers. Compared to non-union employees, ITPE members are stable, trained and committed to a high level of performance. For these reasons were are glad that OMB expanded an agency's authority to use best value in the new A-76. Many of the government contracts in which ITPE represents the workforce were awarded through best value; it should be available government wide. In these cases, the contractors were not penalized because they had collective bargaining agreements. On the contrary, in thee cases the stable and trained workforce may actually have been an asset to the contractors during source selection. Best value benefits those companies that make a commitment to the workforce when credit is given for the greater stability and productivity which result from an organized workforce.

2). The new A-76 eliminates the administrative apeals process within the Circular and directs that A-76 appeals be resolved using the more streamline agency appeals process in the FAR. For cases involving he A-76, the right to file an

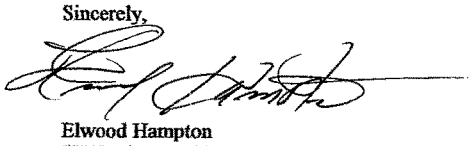
agency appeal is restricted to the agency official who submitted the agency tender, the official who certifies the public reimbursement tender, a private sector offeror or a single individual appointed by a majority of directed affected employees. However, private sector unions are not entitled to file agency appeals. This right should be extended to all employee representatives regardless of the sector in which those employees work. Additionally, the definition of an interested party included in the Competition in Contracting Act precludes labor unions, regardless of whether they represent employees in the private sector or the public sector, from filing protests with the General Accounting Office. From an equity sandpoint, if the right to file a GAO protest is extended to representatives of public employees, it is important to grant the same right to protest to all labor organizations, regardless of the sector.

3.) Some critics of service contracting claim there's little oversight and accountability. While there are certainly problems with some service providers, regardless of the sector, the best way to fully address these differences is with the post award performance reporting and tracking process included in the new A-76. This process could additionally include improved communications between the procurement agencies and the unions which represent the contractors' employees. The greater transparency in the new A-76, as well as any improvements to the communications process, will enable agencies to better track performance of their service providers and make better sourcing decisions in the future.

4.) ITPE is also concerned with the new streamline process which involves any commercial activity involving 65 or fewer FTE. ITPE is concerned because historically streamline cost comparisons resulted in the overwhelming majority of work being retained in-house. Since there is very little guidance provided to agencies in the new A-76 concerning the sreamline process, ITPE is concerned that the process could be manipulated to convert work to in-house performance where ITPE already represents the workforce.

Thank you for the opportunity to submit these comments. ITPE and its members appreciate your oversight of this important issue. We look forward to working with you in the future.

Sincerely,



Elwood Hampton
ITPE Vice President

CC: John Conley/President

Mr. SHAYS. Ms. Styles, you have the floor.

Ms. STYLES. Thank you, Chairman Shays and members of the committee. I appreciate the opportunity to be here today to update you on the administration's Competitive Sourcing Initiative and our recent overhaul of OMB Circular A–76. I am pleased to report that we are making significant progress toward public-private competition being an accepted management practice at our departments and agencies. Our initiative requires a transformation of culture and mind-set from one that resists competition to one that welcomes the value that competition generates.

The administration's Competitive Sourcing Initiative asks people to make very hard management choices, choices that affect real jobs held by very real and dedicated, loyal career civil servants. But the fact that our initiative requires hard choices and a lot of hard work makes it one that can and is affecting fundamental, real and lasting changes to the way we manage the Federal Government.

The clincher here is the taxpayer. This initiative, competitive sourcing, strives to focus the Federal Government on its mission, delivering high-quality services to our citizens at the lowest possible cost. It's a hard pill for a lot of people to swallow or to believe, but we really don't care whether it is the public or the private sector that is delivering those services. Competitive sourcing is a commitment to better management. It is a commitment to ensuring that our citizens are receiving the highest quality service from their government without regard to whether that job is being done by dedicated Federal employees or the private sector. What we care about is the provision of government service by those best able to do so, be that the private sector or the government itself.

Our recent revisions to OMB Circular A–76 could not make this commitment any more clear. Each policy change was made with three questions in mind: What is the right answer for the taxpayer? How can we provide the best service to our citizens at the lowest possible cost? And do we have a reasonable expectation that we can implement this policy?

As we discuss these changes today, many of you are going to ask why particular decisions were made. My answer will probably always be the same, that after extensive discussion we decided that the policy was in the best interest of the taxpayer and providing exceptional service to our citizen at the lowest possible cost. This decisionmaking process applied to many of the difficult decisions, including the elimination of direct conversions, the elimination of policy guidance on Inter-Service Support Agreements, the elimination of the minimum cost differential for a streamlined competition and the elimination of the 50-year-old policy statement that presumed that the private sector was better than the public sector at providing commercial services.

The steps we have taken to improve the process for determining whether a commercial activity will be performed by a public or private source are significant. We committed to a complete overhaul of a broken process, to creating something that was streamlined, transparent and easy to understand. But, most importantly, we committed to creating a process that was fundamentally fair to all parties participating, including our Federal work force.

We also committed to holding our service provider, be they public or private, accountable for results. We have followed through on each and every one of these commitments, and while these changes to the Circular are significant, we recognize that better guidance is only one ingredient for success. Agencies need a knowledgeable and committed management support structure to implement these changes. For these reasons, we are taking a number of actions to make sure agencies have the necessary support structures in place.

First, we are requiring agencies to establish a program office that will be responsible for the daily implementation and enforcement of the Circular. Effective oversight will serve to enhance communications and facilitate sharing of experiences within the agencies and among agencies. This type of a communication may be especially helpful to government providers, many of whom have told us they have the capability to be highly competitive, but they lack the private sector's insight and experience in competing for work.

Second, the Federal Acquisition Council has created a working group to discuss common needs among agencies. This group is being ably led by Scott Cameron from the Department of Interior, who is here today. The working group's efforts should help agencies to better understand and successfully implement the administration's vision for a market-based government.

Third, OMB intends to meet with managers at the scorecard agencies, the 26 CFO agencies, over the coming months to understand what, if any, agency-unique challenges they face and how we at OMB can help them in meeting these challenges. The faster challenges are identified and addressed, the sooner agencies will be in a position to routinely use the competition processes.

While there is a certain level of comfort in maintaining the status quo, our taxpayers cannot afford this, nor should they be asked to support a system that operates at unnecessarily high cost, because many of our commercial activities are performed by agencies without the benefit of competition. For this reason, the administration has called upon agencies to transform their business practices. We have provided tools for meeting this objective in a responsible and fair manner.

This concludes my prepared statement, but I'm pleased to answer any questions you may have.

Mr. SHAYS. Thank you, Ms. Styles.

[The prepared statement of Ms. Styles follows:]

STATEMENT OF ANGELA B. STYLES

ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY

BEFORE THE

COMMITTEE ON GOVERNMENT REFORM

UNITED STATES HOUSE OF REPRESENTATIVES

JUNE 26, 2003

Chairman Davis, Congressman Waxman, and Members of the Committee, I appreciate the opportunity to appear before you today to provide an update on our competitive sourcing initiative and discuss the recently released revisions to OMB Circular A-76. Two years ago, almost to the day, I outlined for your Technology and Procurement Policy Subcommittee the Administration's vision of a market-based government that embraces the ideals of competition, innovation, and choice. I am pleased to say that we have made significant progress since that June 2001 hearing towards fulfilling our vision and transforming agencies' mindset from one that resists competition to one that welcomes the value competition generates. Of particular note, OMB has:

- secured the commitment of senior agency officials to increase the number of government-performed commercial activities that are subject to the dynamics of public-private competition;
- improved the processes agencies use to inventory their commercial and inherently governmental activities and to identify commercial activities suitable for competition with the private sector;

- worked closely with federal managers in developing customized competition plans to reflect differing agency missions, priorities, and workforce mixes and enable the institutionalization of public-private competition in a responsible and reasonable manner;

- strengthened policies and procedures for conducting public-private competitions, so agencies are effectively positioned to select the best public or private provider that can help them meet their needs; and

- negotiated scorecards with each agency to track agency progress and trigger adjustments when results fall short of expectations.

I am particularly gratified by the improvements we have made to the policies and procedures for conducting public-private competitions. These changes, which are reflected in the recently issued revisions to Circular A-76, give federal managers the means to bring about improved program performance and lower costs for their agencies. Today, I would like to discuss some of the market-based, results-oriented changes we have made to Circular A-76. I will then briefly mention the additional management steps we are taking to ensure the success of competitive sourcing over the longer term.

Revisions to Circular A-76

Despite the commitment of our federal managers, overall use of competitive sourcing has been weak. This underutilization is not surprising. For a long time, the acquisition community has argued that the benefit derived from public-private competitions could be much greater if performance decisions were made within more reasonable timeframes, processes were more accommodating to agency needs, and greater attention was given to holding sources accountable for their performance. To address these and other shortcomings, Circular A-76 has been revised to provide a number of results-driven features. Let me highlight a few of them for you.

1. *Time limits for completing competitions.* Timeframe standards have been incorporated into the revised Circular to instill greater confidence that agencies will follow through on their plans and ensure the benefits of competition are realized. Under the revised Circular, a standard competition must generally be conducted within a 12-month period: beginning on the date the competition is publicly announced and ending on the date a performance decision is made. A "standard competition" is the general competitive process required by the revised Circular when an agency selects a provider based on formal offers or tenders submitted in response to an agency solicitation. The revised Circular provides that the agency's competitive sourcing official (CSO) -- i.e., the official within the agency responsible for implementing the Circular -- may extend the 12-month period by 6 months with notification to OMB. Streamlined competitions, which I will describe in a moment, must generally be completed within a 90-day period.

Agencies will be required to publicly announce, through FedBizOpps, the beginning of competitions, performance decisions made at the end of a competition, and any cancellation of an announced competition. Announcements of competition and performance decisions must also be publicized locally.

I should emphasize that the new competition timeframes are not intended to truncate planning. Effective agency planning is a critical prerequisite for sound sourcing decisions and is especially important for agencies that lack experience in conducting public-private competitions. OMB deliberately structured the Circular so that timeframes, for either standard or streamlined competitions, will not begin to run until preliminary planning has been completed.

2. *More accommodating processes.* The revamped Circular is designed to better accommodate agency needs in the conduct of source selections. Options available to the agencies include the following:

- Expanded opportunities to consider best value. Under the revised Circular, agencies have more leeway to take non-cost factors into account during source selection. For example, an agency may conduct a phased evaluation source selection process to consider alternative performance levels that sources may wish to propose. If non-cost factors are likely to play a significant role in the selection decision, an agency may, with certain parameters, conduct a tradeoff source selection process similar to those authorized by the Federal Acquisition Regulation (FAR). The Circular limits use of tradeoffs to: (1) information technology activities, (2) contracted commercial activities, (3) new requirements, (4) segregable expansions, or (5) activities approved by the CSO before public announcement, with notification to OMB.
- Use of streamlined competitions. The prior Circular authorized a "streamlined cost-comparison process." The revised Circular builds on this foundation to create a more versatile process so that agencies may efficiently capture the benefits of public-private competition without the burdens associated with past processes. For activities performed by 65 or fewer full-time-equivalent employees (FTEs), the new streamlined competition gives agencies considerable latitude to make cost-effective choices. For example, when determining an estimated contract price for performing the activity with a private sector source, an agency may use documented market research or solicit proposals in accordance with the FAR. Agencies may use streamlined acquisition tools, such as a Multiple Award Schedules contract to obtain

proposals from the private sector. Irrespective of the tools used to compare the cost of performance between the private and public sectors, agencies must document that their decisions are *cost-effective* before engaging sources to provide services. The Circular provides a streamlined form for agencies to document their business decisions in a simple and straightforward manner.

In light of the significant efficiencies offered by the new streamlined competition process and the general goal of relying on public-private competitions, OMB has eliminated the practice of direct conversions. This change is intended to address the criticism that direct conversions encourage agencies to go directly to contract as a matter of administrative convenience, even where a more efficient, cost-effective government organization could be the better alternative. The new streamlined competition process retains the best features of direct conversions -- namely, significant flexibility and minimal burden -- and combines them with the opportunity to make better economic decisions by considering the abilities of sources from both sectors.

Of course, streamlined procedures, like other parts of the Circular, must be read in conjunction with existing law. Consider, for example, a situation where an agency need could be met by a service that the agency, if it chose to contract with the private sector, would be required to procure from a nonprofit agency employing people with severe disabilities under the Javits-Wagner-O'Day (JWOD) Act. In this case, the nonprofit agency would be the sole representative of the private sector in the agency's comparison of costs between the public and private sectors. While an agency could not directly convert activities to performance by a nonprofit JWOD agency under the

revised Circular, the Circular's streamlined competition form would provide an easy method of demonstrating that the nonprofit could provide the service in a more cost-effective manner than the government provider and at a fair market price, as the law expects when an agency contracts with a nonprofit JWOD agency.

- Consideration of innovative alternative practices. OMB recognizes that the nature of service delivery is constantly changing and our processes must be able to meet taxpayer needs in this dynamic environment. We must always be on the lookout for better ways of carrying out federal missions. To encourage innovation and continual improvement, the revised Circular provides a process by which agencies, with OMB's prior written approval, may deviate from the processes prescribed in the Circular.

  While we must be forward thinking, we must also ensure that deviations are used only when there is good reason to believe significant benefit may be offered and when alternative processes are transparent and impartial. OMB believes the new standard and streamlined competition processes should effectively accommodate agency needs for the vast majority of public-private competitions and will carefully review deviation requests to determine if they are justified.

3. *Post-competition accountability.* During the revision process, we heard numerous complaints regarding weaknesses in post-competition oversight. Among other things, the old Circular required post-competition reviews only for 20 percent of the functions performed by the government following a cost comparison. As a result, even where competition has been used to transform a public provider into a high-value service provider, insufficient steps have been taken to ensure this potential translates into positive results.

Under the revised Circular, agencies will be expected to implement a quality assurance surveillance plan and track execution of both standard and streamlined competitions in a government management information system. Irrespective of whether the service provider is from the public or private sector, agencies will be expected to record the actual cost of performance and collect performance information that may be considered in future competitions.

4. *Balanced and fair practices.* If we are to achieve good results from public-private competitions, we must facilitate the type of robust participation that will bring market pressures to bear, and embrace even-handed practices that result in performance by the best source, irrespective of the sector. The revised Circular seeks to improve public trust in sourcing decisions by reinforcing mechanisms of transparency, fairness, and integrity. In doing so, we have paid particular attention to the new features of the Circular, hoping to reassure critics that changes are intended to improve results, not weaken a source's ability to demonstrate its capabilities. These safeguards include the following.

- Establishment of firewalls. The revised Circular establishes new rules to avoid the appearance of a conflict of interest. In particular, the revised Circular separates the team formed to write the performance work statement (PWS) from the team formed to develop the most efficient organization (MEO) -- i.e., the staffing plan that will form the foundation of the agency's tender. In addition, the MEO team, directly affected personnel and their representatives, and any individual with knowledge of the MEO or agency cost estimate in the agency tender will not be permitted to be advisors to, or members of, the source selection evaluation board.

- Assurance that decisions are cost-effective. While agencies will have greater leeway to consider non-cost factors in standard competitions and more options for comparing public and private sector performance in a streamlined competition, the Circular has been designed to ensure that cost remains a dominant consideration in all agency decisions. For example, the specific weight given to cost or price must be at least equal to all other evaluation factors combined in a tradeoff source selection unless quantifiable performance measures can be used to assess value and can be independently evaluated.

With respect to streamlined competitions, the revised Circular incorporates mechanisms to ensure that agencies act as responsible stewards. First, as I noted a few moments ago, the revised Circular requires agencies to publicly announce both the start of a streamlined competition and the performance decision made by the agency. The notice announcing the initiation of a competition must include, among other things, the activity being competed, incumbent service providers, number of government personnel performing the activity, names of certain competition officials, and the projected end date of the competition. Second, agencies must document cost calculations and comparisons on a standardized streamlined competition form. The official who documents the cost estimate for agency performance must be different from the one who documents cost estimates for performance by either the private sector or a public reimbursable source. Finally, the agency must certify that the performance decision is cost-effective.

- Challenges. The revised Circular authorizes challenges to standard competitions by directly interested parties. Directly interested parties may challenge: (1) a solicitation, (2) the cancellation of a solicitation, (3) a determination to exclude a tender or offer from a standard competition, (4) a performance decision, including, but not limited to, compliance with the costing provisions of the Circular and other elements in an agency's evaluation of offers and tenders, or (5) a termination or cancellation of a contractor or letter of obligation where there is an allegation that such action is based on improprieties concerning the performance decision. Rather than perpetuating a separate A-76 administrative process, agencies will be expected to rely on the agency protest process set forth in the FAR.

Even before committing to conduct a competition, agencies will be held accountable for making rationally-based, good faith decisions. In preparing inventories of their activities, agencies will now be required to prepare written justifications if the agency concludes that a commercial activity is eligible but not appropriate for private sector performance. (In agencies' initial inventory submissions to OMB for fiscal year 2002, commercial activities exempt from competition outnumbered those subject to competition.) These justifications will be available to the public, upon request. Interested parties will continue to be able to challenge the classification of an activity as inherently governmental or commercial. For the first time, interested parties will also be allowed to challenge the rationale (i.e., "reason code") given for government performance of a commercial activity or the determination that a commercial activity is suitable for a streamlined or standard competition.

Ensuring the long-term success of competitive sourcing

Mr. Chairman, as you can see, OMB, in concert with our sister Executive Branch agencies, have taken significant steps to improve the processes agencies use for determining whether a commercial activity will be performed by a public or private source. While these changes should make public-private competitions more manageable and effective, OMB recognizes that better guidance is only one ingredient for success. Agencies need a knowledgeable and committed management support structure to implement the Circular if competitive sourcing is to become an institutional force for better program performance over the long term. For this reason, we are taking a number of actions to make sure agencies have the necessary support structures in place.

First, we are requiring agencies (including the Military Departments) to establish a program office that will be responsible for the daily implementation and enforcement of the Circular. Effective oversight will serve to enhance communications and facilitate sharing of experiences within the agency so agencies may reinforce their successes and make adjustments where shortfalls occur. This type of communication may be especially helpful to government providers, many of whom have told us they have the capability to be highly competitive but lack the private sector's insight and experience in competing for work.

Second, the Federal Acquisition Council (FAC) has created a working group to address common agency needs. Last week, for example, the working group hosted a government-wide conference to acclimate agencies to the principles and new processes of the revised Circular. A number of private consultants participated on a panel to offer their ideas on effective planning. In the coming months, the working group will assist in

facilitating the posting of lessons learned and best practices on *SHARE A-76!,* a Defense Department management system used to disseminate knowledge, information, and experiences about public-private competitions. Through *SHARE A-76!,* agencies will be able to routinely use current experiences to inform and improve competition practices and decision making. The working group's efforts, like others sponsored by the FAC, should help agencies to better understand and successfully implement the Administration's vision for a market-based government.

Third, OMB intends to meet with managers at the "scorecard" agencies over the coming months to understand what, if any, agency-unique challenges management faces and how we can help them in meeting these challenges. The faster challenges are identified and addressed, the sooner agencies will be in a position to take routine advantage of the improved competition processes and the benefits they will generate. To determine if the initiative is taking hold, we will look behind the competition plans for evidence of sound strategic planning, quality and timely competitions, and the like. These are important indicia of the likely long-term success of competitive sourcing.

Conclusion

While there is a certain comfort level in maintaining the status quo, our taxpayers simply cannot afford -- nor should they be asked to support -- a system that operates at an unnecessarily high cost because many of its commercial activities are performed by agencies without the benefit of competition. For this reason, the Administration has called upon agencies to transform their business practices and increase the amount of government-performed commercial activities that are subject to competition. In doing so,

we have provided tools for meeting this objective in a responsible and fair manner. I appreciate the Committee's ongoing interest in competitive sourcing and hope the acquisition community will give these tools a reasonable chance to take hold as we work together to bring lasting improvements in the performance of government.

This concludes my prepared statement. I would be pleased to answer any questions you may have.

Mr. SHAYS. Mr. Grone.

Mr. GRONE. Thank you, Chairman Shays.

Mr. Shays and distinguished members of the committee, I am pleased to have this opportunity to appear before you today to discuss the revision to OMB Circular A–76 and its expected impact on the Department of Defense.

We know the forces of competition produce more efficient services at reduced cost to the taxpayer, regardless of who performs these services. We were successful at achieving savings under the old Circular, and we believe the new Circular provides an opportunity to strengthen the efforts of employees, industry and managers of a competitive sourcing program to produce the best outcome that meets the mission needs of the Department in the most cost-effective and efficient manner.

The administration through OMB has taken significant steps toward these objectives by providing a competitive framework that promotes fairness, transparency and accountability. The Department's initiatives support the President's vision of a market-based government used to achieve our President's Management Agenda goals for competitive sourcing. We intend to use the new Circular to meet the Department's competitive sourcing targets.

As we implement the new Circular, we will review our ongoing programs to determine how best to comply with the Circular's transition objectives. A smooth transition is absolutely essential. We believe the credibility of the new process depends upon the successful execution of these initial competitions. As we start competitions using the new procedures, we need to ensure responsible officials are properly trained for new and expanded duties.

We will continue to work closely with our dedicated and resourceful work force to promote the fairness, transparency and accountability the Circular advocates as the Department implements the new procedures. Employee involvement in our competitions has been essential to successful results, and we will ensure their continued participation as we implement the new process. Clearly defined representatives of directly affected employees as outlined in the Circular brings standardization to the process, ensuring the ability of employees to participate fully while avoiding the appearance of conflicts of interest.

We believe there are significant positive elements of the new Circular: The designation of competitive sourcing officials and centralized management are crucial to spreading best practices and avoiding common pitfalls of competitions in the past.

Clear and unambiguous application of the Federal Acquisition Regulations in combination with the Circular require contracting officers to evaluate all prospective providers, private and public, in a single evaluation process that will enhance transparency. The use of a one-step process should help level the playing field for all participants, mitigating a common complaint about past competitions.

The new Circular's emphasis on preliminary planning recognizes a long-standing need for proper preparation. Proper preliminary planning leads to better packaging of activities for competition and avoids negatively impacting on Federal employees. Preliminary planning is among the most important improvement to facilitate reducing the length of the process.

OMB's new tradeoff source selection process promotes best-value competitions and is available to all agencies except the Department of Defense. At the present time, we are limited to the lowest-cost provider due to the statutory limitations imposed by section 2462 of title 10, United States Code. The Department continues to believe relief from this limitation would further encourage innovation by both the public and private providers and significantly improve the quality of services. We continue to urge the Congress to adopt this part of the Secretary's transformation legislative package to put us on a par with our sister Federal agencies who are not limited in this fashion.

Mr. Chairman, the Department is pleased that the new Circular recognizes DOD's A–76 costing expertise and requires use of our A–76 costing software known as COMPARE for all Federal agencies. Costing the government will remain a challenging part of the public-private competition process, but standardization allows all parties to understand the rules that are used.

The knowledge management Web site developed by the Department known as SHARE A–76! will continue to promote the sharing of best practices resulting from A–76 competitions conducted by all Federal agencies.

In spite of all the anticipated positives of the new Circular, we do anticipate for a period of time we will likely have a program operating under two sets of rules to some degree. The new Circular will apply to a number of ongoing competitions while some in-progress competitions will need to be completed under the old Circular. We will make public announcements of competitions requiring transition by the Circular and ensure the requirements of the new and old Circulars are not combined to the advantage of any party.

Again, I want to emphasize it does not matter who wins public-private competitions as long as the decision delivers results, services at the best value for the taxpayer.

As of June 1, 2003, the Department of Defense has completed competitions in excess of 71,000 positions; and this exceeds the 15 percent competitive sourcing target negotiated with OMB for this fiscal year. By reaching this target, we hope to be among the first Federal agencies to reach yellow status on the score card.

Mr. Chairman and committee members, thank you again for the opportunity to address these important issues today; and I'm happy to answer any questions you may have.

Mr. SHAYS. Thank you, Mr. Grone.

[The prepared statement of Mr. Grone follows:]

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HOUSE COMMITTEE ON
GOVERNMENT REFORM

STATEMENT BY

MR. PHILIP W. GRONE

PRINCIPAL ASSISTANT DEPUTY UNDER SECRETARY OF DEFENSE

(INSTALLATIONS AND ENVIRONMENT)

BEFORE THE

HOUSE COMMITTEE ON GOVERNMENT REFORM

UNITED STATES HOUSE OF REPRESENTATIVES

SECOND SESSION, 108TH CONGRESS

OMB REVISION TO CIRCULAR A-76

June 26, 2003

FOR OFFICIAL USE ONLY
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HOUSE COMMITTEE
ON GOVERNMENT REFORM

Chairman Davis, Mr. Waxman and distinguished members of the Committee; I am pleased to have this opportunity to appear before you today to discuss the revision to OMB Circular A-76 and its expected impact on the Department of Defense.

As we consider approaches to better utilize our personnel, competitive sourcing provides a methodology for focusing on our core capabilities. The Department must continue to do business better, faster and at reduced cost to maintain our focus on readiness. In order to focus on what we do best - - our core mission activities - - we must become more efficient in our support, or non core, functions.

The Department has long experience demonstrating that the forces of competition produce more efficient services at reduced cost to the taxpayer, regardless whether public or private sector performs these services. While we were successful at achieving savings under the old Circular, the process was often frustrating for all involved. We believe the new Circular provides us with a fresh start with employees, industry, and managers of the competitive sourcing program. We must take strides to avoid the adversarial nature that often surrounded past A-76 competitions.

The Department believes OMB has taken significant steps toward this goal by providing a competitive framework that promotes fairness, transparency, and accountability. The faster, one-step process has a specific time limitation but allows a common sense approach that permits us to properly prepare for these competitions through preliminary planning. By aligning the new public-private competition process

more closely with procedures already used under the Federal Acquisition Regulations (FAR), transparency and fairness is enhanced for all participants. The Department's initiatives support the President's vision of a market-based government used to achieve our President's Management Agenda goals for Competitive Sourcing. We intend to use the new Circular to meet the Department's competitive sourcing target. The Business Initiatives Council, chaired by the Acting Under Secretary (Acquisition, Technology and Logistics) is currently reviewing future Competitive Sourcing plans for submission in the FY 2005 program and budget cycle.

As we implement the new Circular in the Department of Defense, we must review our ongoing program to determine how to best comply with the new Circular's transition objectives. A smooth transition is absolutely essential because we believe that the credibility of the new process depends on our successful execution of these initial competitions. As we start competitions using the new procedures, we need to ensure responsible officials are properly trained for new, expanded duties. Agency Tender Officials, Human Resource Advisors, and contracting officers now have specific designated responsibilities to perform during these new public-private competitions. The new Circular specifically assigns responsibility to key competition officials to ensure that specific requirements are performed by the appropriate experts, such as the personnel related requirements that are clearly now the responsibility of a Human Resource Advisor. The contracting officer's role has also been delineated to ensure both the FAR and Circular requirements are consistent but this delineation leads to increased

responsibilities. And Agency Tender Officials will play a major role in future competitions and their specific responsibilities are entirely new.

We must continue to work closely with our dedicated and resourceful workforce in order to promote the fairness, transparency, and accountability that the Circular advocates as the Department implements the new procedures. Employee involvement in our A-76 competitions has always been essential to successful results and we will ensure their continued participation as we implement the new process. The role of the Agency Tender Official provides the employees with a designated individual who has the responsibility and, more importantly, the authority to develop a competitive agency tender. He will be responsible to ensure that employees have a voice during the entire process. The Human Resource Advisor is another added advantage for the employees since this individual will be able to address personnel related issues that arise in developing a competitive agency tender. This official will also interact with directly affected employees throughout the entire competitive process. The clear definition of representatives of directly affected employees that is included in the Circular also brings standardization to the process that will ensure their participation while avoiding the appearance of conflicts of interest.

I'd like to highlight some of what I believe are the more critical and positive elements of the new Circular.

- The designation of Competitive Sourcing Officials and centralized management are key to spreading best practices and to avoid common pitfalls of A-76 competitions of the past.
- The appointment, accountability, and specified responsibilities of specific competition officials will be instrumental to conduct fair and successful competitions.
- Clear and unambiguous application of the FAR in combination with the Circular that require contracting officers to evaluate all prospective providers, private and public, in a single evaluation process will greatly enhance transparency. The use of a one step process should help level the playing field for all participants, mitigating a common complaint about past competitions.
- The emphasis on Preliminary planning properly recognizes a long-standing need that emphasizes that proper preparation for competition is the essential first step in the success of a competition. Proper preliminary planning leads to the better packaging of activities for competition and avoids negatively impacting unaffected employees. Preliminary planning is the single improvement that will lead to the new 12 month goal for completing our competitions.
- Best value for the taxpayer is the goal of every acquisition in the Federal Government. OMB's tradeoff source selection process allows best value in the new standard competition process and is a significant enhancement compared to the old "cost comparison" process. This enhancement is available to all agencies except the Department of Defense. We are limited to best value with the lowest cost provider due to the statutory limitation of Section 2462 in Title

10 of the United States Code. The Department's transformation legislative package proposes relief from this restriction in order to encourage inclusion of innovative business practices in both public and private sector bids.

- The streamlined competition requirements are a significant improvement over the direct conversion and streamlined process contained in the previous Circular. The new process is structured in such a manner as to provide maximum flexibility for agency implementation of smaller initiatives. We believe that the standardized approach, accelerated time lines and appropriate firewalls will preclude preconceived outcomes.
- The new Circular also recognizes DoD's A-76 costing expertise and requires use of our A-76 costing software known as COMPARE for all federal agencies. Costing the government tender will remain a challenging part of the public-private competition process, but standardization will all parties understand the rules to be used.
- Our knowledge management web site known as SHARE A-76! will continue to promote the sharing of best practices resulting from A-76 competitions conducted by all Federal agencies.
- Finally, another significant improvement to the public-private competition process is the elimination of a separate and confusing administrative appeal process that conflicts with protest procedures under the FAR. We believe the procedures in the revised Circular allow all parties with equal access to remedies for perceived inaccuracies in these competitions.

In spite of all the anticipated positives of the new Circular, we anticipate that for a period of time we will have a program that operates under two sets of rules. The new circular will apply to a certain number of ongoing competitions while other in-progress competitions will be completed under the old circular. We will make public announcements of the competitions that will transition as required by the Circular. Regardless of the rules, we will ensure that the requirements of the new and old circulars are not combined to the advantage of any party. Another example of duplication that will have to be maintained is the costing software. We anticipate that our update of COMPARE to incorporate the new A-76 costing guidance will be available to other agencies within the next month. Nonetheless, separate costing software versions will need to be maintained to comply with the two differing sets of costing policies under the new and old Circular for the next year or so.

Again, I want to emphasize that it does not matter who wins public-private competitions as long as the decision delivers results--services at the best value for the taxpayer. As of June 1, 2003, the Department of Defense has completed competitions in excess of 71,000 positions. This exceeds the fifteen percent competitive sourcing target negotiated with OMB for FY 2003. By reaching this target, we hope to be one of the first federal agencies to reach yellow status for the competitive sourcing initiative. We need to move forward in our use of these new procedures in order to meet the long-term fifty percent target identified in the President's Management Agenda.

Mr. Chairman and Committee members thank you again for the opportunity to address these important issues with you today and I am happy to answer any questions you may have.

Mr. SHAYS. Mr. Cameron.

Let me just say we've been joined by Ms. Norton from D.C.

Mr. CAMERON. Thank you very much, Mr. Chairman and members of the committee. I'm delighted to be with you today to talk about the Interior Department's competitive sourcing program and Circular A–76.

We view the President's Management Agenda as a set of tools to help us improve the quality and cost-effectiveness of the services we provide the American people. Competitive sourcing is one of those tools to enhance value for our citizens. Interior's competitive sourcing program emphasizes competition as a tool for enhancing performance. It also emphasizes the importance of periodic review of how we deliver services to assess whether we can serve the public, our customers, better through reengineering, through outsourcing or by maintaining existing structures. As we focus on how to best meet the public's needs, we are also focused on making certain that our highly dedicated employees are treated fairly.

Our challenge as managers is to show our employees how competitive sourcing can be a tool to advance the agency mission to which they are so very strongly committed. As we generate efficiencies, our bureaus can reinvest in mission delivery any savings that they generate by competitive sourcing, and in this way competitive sourcing can provide resources that we can plow back into our parks, back into our other programs, our other activities in the Department, to increase the level of service to the American public.

We believe that changes made to this Circular will help the Federal Government become more results-oriented, citizen-centered and efficient. The new Circular also reinforces employees' ability to compete by allowing them to reengineer functions with less than 65 FTEs and by removing the presumption that commercial functions belong in the private sector.

One point of my testimony I think is very worth communicating at this point, Mr. Chairman, is that Interior has analyzed approximately 1,600 FTEs through competitive sourcing, and I'm happy to tell you that, while our employees have won some of those competitions and lost some of those competitions, in no case has a single Interior employee been involuntarily separated from permanent service as a result of those studies to date.

Our study plan for fiscal years 2002 through 2004 now equals approximately 25 percent of the FTEs listed as commercial in our year 2000 FAIR Act inventory. That represents just 7 percent of the Department's total employment.

I would like to add that competitive sourcing has proven economically beneficial to some of our former employees. In a review of Federal employee lifeguards in Florida, for instance, in the National Park Service, the winning contractor hired all our former temporary and seasonal workers; and these employees report they are now working more hours for the contractor than they did as government employees. So they are bringing home more pay as a result.

The Department communicates on a frequent basis with employees involved in ongoing and planned studies. We use town hall meetings, e-mail, newsletters and other means. These efforts have proven effective. We also keep our Departmental Council on Labor-

Management Cooperation, which is a joint labor-management organization, informed about the changes that we're making in competitive sourcing and the progress of studies within the Department.

If the committee would be interested, I brought half a dozen copies of a resolution that our Labor-Management Council adopted on competitive sourcing which commits both labor and management to pursuing competitive sourcing in a way that ensures employee rights and provides best value to the taxpayer. So if the committee is interested, we can provide that for you.

The Department's guidance for developing the fiscal year 2004 competitive sourcing plan requested that each bureau reflect on the Department's strategic human capital management plan and its implementation plan. The guidance further asks the bureaus to consider for competitive sourcing functions areas where we have high projected attrition rates, significant skill imbalances, recurring performance challenges, or chronic skills shortages.

Bureaus were also asked to consider studying functions where a significant amount of contracting was already taking place in other bureaus, as well as situations where competitive sourcing studies were already well under way in other bureaus. In both cases, the thought was we could learn from the work and experience of others.

We've invited our bureaus to resubmit their fiscal year 2004 competitive sourcing plans in light of the new Circular. We're also consulting with Angela here about how to handle the 64 streamlined studies that we already had under way at the time the new Circular came out; and we're hopeful that we'll be given permission shortly to go ahead with those studies, essentially grandfather them under the old Circular.

In closing, the Department fully supports the new Circular. We think that it's a tool to improve the delivery of services to the American people. We believe we can conduct the program in a way that's fair to our employees.

I'd be delighted to answer any questions the committee might have.

Mr. SHAYS. Thank you, Mr. Cameron.

[The prepared statement of Mr. Cameron follows:]

STATEMENT OF
SCOTT J. CAMERON, DEPUTY ASSISTANT SECRETARY
FOR PERFORMANCE AND MANAGEMENT,
OFFICE OF THE ASSISTANT SECRETARY FOR
POLICY, MANAGEMENT & BUDGET
U.S. DEPARTMENT OF THE INTERIOR
ON
THE COMPETITIVE SOURCING INITIATIVE
BEFORE THE
COMMITTEE ON GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES
JUNE 26, 2003

Mr. Chairman and Members of the Committee, I appreciate the opportunity to discuss the Department of the Interior's (Department) Competitive Sourcing Initiative and the revised Office of Management and Budget (OMB) Circular A-76 (Circular).

We view the President's Management Agenda as a set of tools to help us improve the quality and cost-effectiveness of the services we provide the American people. Competitive sourcing is one of those tools to enhance value for our citizens. Interior's competitive sourcing program emphasizes competition as a tool for enhancing performance. It also emphasizes the importance of periodic review of how we deliver services to assess whether we could serve the public better through re-engineering – through outsourcing or by maintaining existing structures. As we focus on how to best meet the public's needs, we are also focused on making certain that our highly dedicated employees are treated fairly.

The Competitive Sourcing Initiative asks agencies to effectively manage financial and human resources, and create the infrastructure necessary to routinely conduct public-private competitions. This effort requires agencies to make some careful choices. These decisions may affect real jobs, held by hard-working and loyal career civil servants. Competitive sourcing can bring about fundamental, and lasting, improvements to the way the federal government serves the public. Our challenge as managers is to show our employees how competitive sourcing can be a tool to advance the agency mission to which they are committed. As we generate efficiencies, our bureaus can re-invest in mission delivery any savings they generate by competitive sourcing.

The revised Circular greatly enhances the competitive sourcing program by focusing on competition to provide the best services at the best price. We believe the changes made to the Circular will help the federal government become more results-oriented, citizen-centered, and efficient. The new circular also reinforces employees' ability to compete by allowing them to reengineer functions with less than 65 full time employees (FTE), and by removing the presumption that "commercial" functions belong in the private sector.

After eighteen months of hard work by the Department and its bureaus, we are beginning to see real progress. To date, of the FTEs that we have analyzed, no involuntary separations have been necessary in the Department.

The Department also plans to study an additional 10 percent of our fiscal year (FY) 2000 FAIR Act Inventory FTEs by the end of 2004. The study plan for fiscal years 2002, 2003, and 2004 now equals approximately 25 percent of the FTEs listed as commercial in that inventory, or 7 percent of the Department's total employment.

I would like to add that competitive sourcing has proven economically beneficial to some of our former employees. In a review of federal employee lifeguards in Florida, the winning contractor hired all our former temporary and seasonal employees, and these employees report they are now working more hours for the contractor than they did previously with the Department (taking into account work performed both for the government and private sector clients), resulting in higher incomes.

The new Circular adopts a number of the Department's innovations, which we have used extensively with OMB approval to accomplish our competitive sourcing goals. For example, over 90 percent of the commercial functions in the Department involve less than 10 FTEs, and these functions are spread over 2400 locations nationwide. To provide employees in small functions a chance to compete, instead of facing direct conversion to outsource services, the Department developed the "Express Review" process. For functions with less than 10 FTEs, Express Review allows for an in-house bid based on the existing work force. The in-house bid is then compared to four existing comparable contracts. If the in-house bid falls within a competitive range of the four existing contracts, the federal workforce may continue to perform the activity without further competition.

In addition, the Department developed a streamlined competition process to allow for development of a "Most Efficient Organization" (MEO) in the many functions where we have less than 65 commercial FTEs. The MEO concept allows for re-engineering and improvement in a function and streamlined costing concepts for competition. It gives employees a chance to be better competitors.

OMB adopted both of these concepts in the new Circular. We believe that OMB's endorsement of the Department's streamlined competition processes enhances our internal program, allowing even our smallest functions to compete effectively.

As we have undertaken direct conversions at the Department, we have required our managers to provide written justification for why they selected the direct conversion option and why this action was in the economic best interest of the public. By requiring this, we have protected employees against any real or perceived unfairness or arbitrariness in competitive sourcing decisions.

The Department communicates on a frequent basis with employees involved in on-going and planned studies. We provide for monthly communication – through town hall meetings, e-mail, newsletters, or other means – with employees in functions that are under study. These efforts have proven effective. We also keep our Departmental Council on Labor-Management Cooperation informed about changes in competitive sourcing, and the progress of studies within the Department.

We anticipate numerous benefits from the new Circular, as compared to the previous approach:

- It reduces the time to complete competitions. Previously some competitions took from 2 to 4 years to complete. The new Circular sets achievable timeframes for completion of studies of any type (*e.g.*, 12-18 months for standard competitions and 90-135 days for streamlined competitions). Managers will now be held accountable for lengthy competitions that hurt morale and discourage non-government bidders.
- It gives managers the flexibility to achieve best value for the taxpayer by allowing the use of existing Federal Acquisition Regulation (FAR) Part 15 rules, including the use of cost and technical tradeoffs.
- It demands accountability. The Circular clearly states that the in-house winners of competitions must meet specific performance requirements.
- It eliminates the appearance of conflicts of interest by requiring firewalls between those preparing competitive sourcing documents required by the Circular, including the Performance Work Statement and the MEO.
- It helps agencies with costing analysis. The Department of Defense costing model, "winCOMPARE," is now available to all agencies, and the new Circular requires use of this software for costing all studies.

The Department's guidance for developing the FY 04 Competitive Sourcing Plan requested that each bureau reflect on the Department's Strategic Human Capital

Management Plan and its Implementation Plan. The guidance further asked the bureaus to consider for competitive sourcing those functions where there are:

- High projected attrition rates;
- Significant skill imbalances;
- Recurring performance challenges; or
- Chronic skills shortages.

Bureaus were also asked to consider studying functions where a significant amount of contracting was taking place in other bureaus as well as those where competitive sourcing studies were already underway in other bureaus – providing each bureau the opportunity to derive a benefit from the work and experience of others.

We have invited our bureaus to re-submit their FY 04 Competitive Sourcing Plans to give them the opportunity to make adjustments based on the new Circular. We are also consulting with OMB on the appropriate way to handle the 64 Express Reviews that were underway at the Department when the new Circular was published.

Conclusion

In closing, the Department fully supports OMB's new Circular, and will continue competition to obtain commercial activity services in the most cost-effective manner while achieving best value for the American public. The Department's employees are among the Nation's most highly-trained and dedicated workers. We must work together with the private sector to meet current requirements and to pursue innovative ways to

carry out the many challenges we face in accomplishing our mission. We must continue to be creative as we implement the President's Management Agenda, and must ensure that we take full advantage of the best capabilities offered by both the public and private sectors.

We are assessing the best ways to accomplish our mission and, using competitive sourcing as a business management tool, we are testing our assumptions. As noted above, the competitive sourcing effort seeks to improve the way we do business.

This initiative has its challenges, but we believe our approach ensures fairness, effectiveness, and efficiency. Mr. Chairman, this concludes my prepared statement. I would be pleased to respond to any questions that you might have.

Mr. SHAYS. What my intention is as Chair is to recognize Mr. Ose and then go to Mr. Van Hollen, Ms. Norton and Mr. Tierney, and then I'll ask some questions. We'll do the 5-minute rule right now and maybe do a second round.

You have the floor, Mr. Ose.

Mr. OSE. Thank you, Mr. Chairman.

Mr. Cameron, it's good to see you again. I know we've visited previously on paperwork reduction. I'm still interested in that checkoff.

Mr. CAMERON. Actually, I thought I'd see you in Mr. Putnam's committee last week. So I did the research. The answer is, we're still on track.

Mr. OSE. Good. Stay there.

Mr. Walker, thank you for your testimony.

A couple questions, if I might. I want to preface my questions by saying, as I did in my opening statement, that subsequent to the November proposed policy change, my staff did a lot of work. In fact, we sent out inquiries to 102 different Federal agencies. I want to mention that because I want to take note of the work that Chris Rich and Brooke Greer did in assimilating and compiling these data. We come to this meeting today with significant information, and it's a function of Chris's and Brooke's good work.

On page 3 of your testimony—your written statement, Mr. Walker, you state, effectively implemented, the new Circular should result in increased savings, improved performance and greater accountability, regardless of the service providers selected.

The question I have is, has GAO estimated the potential dollar savings in the first year, the second year and then annually thereafter?

Mr. WALKER. No, we have not. And that would be virtually impossible to do, because you have no degree of certainty as to how many competitions will occur, what functions they will be.

I think we can say that, historically, based upon data that we've seen in the past, is that there have been significant cost savings that have been achieved and inured to the benefit of the taxpayer, irrespective of who wins in the past—in other words, whether the Federal workers win because of the creation of a most efficient organization or whether contractors win—but at least initially there have been significant savings that have occurred in the past.

Mr. OSE. OK. So your estimate, if you will, the savings is a function of historical trends rather than a prospective look?

Mr. WALKER. That's correct. I mean, we can report on what's occurred in the past; and what we can say is that we believe—and you said the right words, "if effectively implemented." Because, you know, we find that there's sometimes a difference between design or plan and actual. There is an opportunity for additional savings here, no question.

Mr. OSE. When you think in terms of savings, do you have some sense of perhaps the range of percentages that we might have in savings?

Mr. WALKER. Historically, the savings have been in the 20 to 30 percent range with regard to historical competitions, no matter who wins the competition. But I think it's important to note cost is im-

portant, but cost is not everything. We obviously are concerned about reliability and quality and other issues, too.

Mr. OSE. Second question. On page 6 of your written statement, you mention that GAO has listed contract management at NASA, HUD and DOE, Department of Energy as an area of high risk, the contract management function. What do you recommend to ensure that these three agencies can fairly implement the new A–76 Circular without disadvantaging Federal employees currently performing commercial functions?

Mr. WALKER. These Federal agencies in particular have met the criteria in the contract management area for being deemed to be high risk, as noted by GAO's public criteria. There are other Federal agencies that have serious challenges in the area of contract management.

Our experience has shown that if for some reason through competitive sourcing or other methods the Federal Government ends up contracting out certain responsibilities and functions to the private sector that it is critically important that they maintain an adequate number of qualified, capable Federal employees who can manage cost, quality and performance of that contractor; and if they do not do that, then the government is at risk, the contractor is at risk, and the taxpayers are at risk. So I think that if there's going to be more that's going to be done by private-sector employees of traditional government functions or activities, if you will, then it's going to be critically important that capability exist in the government to make sure that we don't end up having more high-risk areas or we exacerbate the ones that we already have.

Mr. OSE. Mr. Chairman, at some point or another I hope we do talk about the training necessary for contract officers under this scenario, because this is, as Mr. Walker is suggesting, a very critical piece to the successful implementation.

Ms. Styles, on page 11 of your written statement, you state, "our taxpayers simply cannot afford—nor should they be asked to support—a system that operates at an unnecessarily high cost because many of its commercial activities are performed by agencies without the benefit of competition."

Has OMB estimated the potential dollar savings in the first year, second year or thereafter?

Ms. STYLES. No, we have not. What we have done is created a system within the Circular for collecting that information.

One of the problems in the past has been that the information has been difficult to collect and not consistently collected. We have requirements in the Circular for consistent collection governmentwide for the creation of baselines for an understanding not only of what we project the cost savings to be but to ensure that we are actually achieving the cost savings that we project into the future.

Mr. OSE. Thank you, Mr. Chairman.

Mr. SHAYS. Thank you. I thank the gentleman.

Mr. Van Hollen.

Mr. VAN HOLLEN. Thank you, Mr. Chairman.

I thank all the witnesses.

Let me just understand one thing, because I represent the 8th Congressional District in Maryland. It obviously has a lot of Federal employees, and I've visited a lot of Federal agencies. In talking

to the head of a lot those Federal agencies, some of them have provided assurances to their employees that they will not lose employment as a result of this. They may be shifted around to different positions and that kind of thing.

My question is, is that realistic? How are we going to achieve the kind of cost savings that we're talking about if no one is laid off? I have concerns that despite promises or assurances that we're going to see large layoffs——

My question, I guess, Ms. Styles, is best addressed to you. What kind of assurances can you provide to the Federal work force that people aren't going to be losing jobs?

Ms. STYLES. It's being applied differently at different departments and agencies. I think each department and agency has a different look at their human capital plan, different numbers in terms of retirements. Some of them have more flexibility than others to move employees to open positions, to retrain them. Many of the people are also at retirement age, end up retiring and go to work for a Federal contractor. We work with each department and agency on their plan to see how they address it with their work force to ensure that the relevant laws are followed, where agencies have no RIF goals in place, that they aren't setting forth a goal that they can't follow through on. Other agencies have not set that goal because they don't believe that they have available positions or that they're going to be able to retrain or move people around in their organizations. So it varies a great deal from agency to agency.

Mr. VAN HOLLEN. Yes.

Mr. CAMERON. Mr. Van Hollen, perhaps I can help in terms of the Interior Department context.

Over the next 5 years, roughly 20 percent of our employees are eligible to retire. We are studying under competitive sourcing about 7 percent of our employees over the next several years. We think we'll win most of those competitions, so that perhaps leaves you a situation with a couple of percent of employees where we have to find other positions in the Department, while 20 percent of the folks are eligible to retire. So that gives us some optimism.

Mr. VAN HOLLEN. Yeah.

Mr. WALKER. If I can, Mr. Van Hollen, there's a difference between whether or not they still have employment if they want employment versus whether they're working for the Federal Government. There are many, as you know, that end up going to work for the contractors, and so therefore they still have a job, but they're not working for the Federal Government. There are others who end up voluntarily retiring, early or otherwise, and they have decided they don't want to work.

I think it would be highly unlikely that you're going to find a situation where we're going to achieve significant savings unless there are some numbers of people who no longer work for the Federal Government. They may still be employed. There may be some reallocation within the Federal work force where we need people and we don't have enough and therefore they can be re-employed, but I think there's no question there's going to be a decline in Federal employment as a result of these competitions.

Mr. VAN HOLLEN. Have you done any analysis to determine, that correlates savings to an anticipated decline in employment with the Federal Government?

Mr. WALKER. I think we have to be very careful to make sure that the deck is not stacked for a predetermined outcome. What competitive sourcing is all about from my standpoint, it is a tool. It is a means to an end. It is not an end in and of itself. And that, ultimately, is what we want to make sure, that we've got the right people doing the work as efficiently and effectively and as economically as possible.

So, to me, I look at this as a sourcing strategy. It could be outsourcing, it could be in-sourcing, and in many cases it could be co-sourcing, where the functions are performed by a combination of contractors and Federal workers. I think we have to be very careful not to be predisposed one way or the other. It's getting the right answer.

Mr. VAN HOLLEN. Right. I don't want to lose all my time here. I think it's very important we don't stack the deck, too; and I'm very concerned that the deck is stacked. For example, my understanding is that a private contractor that loses a bid or loses his competition has the ability to appeal. Whereas my understanding is—and correct me if I'm wrong—whatever Federal group—group of Federal employees, if they don't succeed in winning the competition and lose the—they don't have the right to appeal. Is that right?

Mr. WALKER. It's a matter of who they have the right to appeal to. Right now, the Federal workers or representatives of the Federal workers do not have a right to appeal to the GAO. We, however, have a Federal Register notice out right now asking for public comment about whether and under what circumstances, representatives of Federal workers should have the right to appeal to the GAO in certain circumstances. My personal view is, if we want to create a level playing field, there are some circumstances in which they ought to have that right, and we're looking forward to receiving the results of public comment and then being able to make a decision thereafter.

Mr. VAN HOLLEN. Well, no, I would think—I have lots of concerns with this whole—some of the—other concerns proposed, but the very least it seems to me people should have an equal right to appeal a decision that's been made with respect to their employment.

Thank you, Mr. Chairman.

Chairman TOM DAVIS [presiding]. Thank you very much.

Mr. Shays.

Mr. SHAYS. Thank you, Mr. Chairman.

Let me start my questions by saying OMB recently revised its competitive sourcing goals to require agencies to begin an A–76 competition on 15 percent of the commercial activities by 2004. The initial goal would have required agencies to compete 15 percent of all commercial activities by September 2003. So, Ms. Styles, what was OMB's rationale for changing its competitive sourcing goals?

Ms. STYLES. We actually haven't changed the goals, per se.

Let me give you a little history on this because this is a very confusing area.

Mr. SHAYS. Very little.

Ms. STYLES. Very little, but it's important to understand.

We came out at the beginning of the administration and said a 15 percent governmentwide goal over a period of 2 years. We asked the agencies to generally presume that 15 percent was going to be appropriate for them. We developed, tailored individual plans for each department and agency based on their mission and needs. We are not going to have more than four or five agencies that actually compete 15 percent of their commercial activities before the end of this fiscal year, mainly because we realize it's going to take a long time to implement and put that infrastructure in place and we want it done right.

I set a personal goal. We went out with a——

Mr. SHAYS. I think you've answered the question.

Mr. Grone and Mr. Cameron, will your agencies be able to meet the goal of initiating competitions for 15 percent of your agencies, commercial positions by July 2004?

Mr. CAMERON. At Interior, yes.

Mr. GRONE. Mr. Shays, based on where we are now in the context of our competitions, as of June 1st of this year we're looking at the 15 percent target.

Mr. SHAYS. Ms. Styles, what will happen to agencies that don't meet this goal?

Ms. STYLES. We'll continue to work with them to make sure that they have the infrastructure in place. We have agencies that won't meet it until 2007. We're trying to make this rational and appropriate for each——

Mr. SHAYS. So you're just working with them?

Ms. STYLES. Yes.

Mr. SHAYS. For the last several decades the basic government policy or principle has been to rely on the private sector for needed commercial services. This principle has been in Circular A–76 for many years. Why isn't this policy or principle included in the revised Circular?

Ms. STYLES. Because for a number of years we had a situation where we were inconsistent. We said that we wanted to rely—that the private sector was presumed to provide commercial services cheaper and better than the public sector. At the same time, we had a process for determining who was the better sector, public or private. We wanted to tell people that we were actually committed to determining whether the public sector or the private sector was better to provide these services to our citizens. We didn't want to presume that one sector was necessarily better than the other in our policy statement, which is why we removed it.

Mr. SHAYS. What kind of questions have agencies had for OMB regarding the new A–76 process? How has OMB ensured that it has given consistent guidance to these agencies?

Ms. STYLES. We've had a number of questions, but fewer than I would expect, because we spent a considerable amount of time between the release of the draft and the final Circular working with every department and agency to make sure that they could implement this Circular. We have had two primary questions, one dealing with direct conversions, when direct conversions actually end so they can't actually do any more direct conversions, and the other

one is the application of the minimum cost differential for ongoing streamlined cost comparisons.

Mr. SHAYS. According to the General Accounting Office, A–76 competitions performed by the Department of Defense take an average of 25 months—that blows me away—to compete. The new Circular requires agencies to compete in A–76 competition in 12 months. So what specific change, Ms. Styles, in the new Circular will assist the agency in meeting the 12-month deadline?

I'm tempted to ask—let me ask Mr. Walker. Why does it take 25 months?

Mr. WALKER. It's a very complex process, and I think the bottom line is it can, must and should be expedited, but in order to be able to hit the kind of timeframes that are proposed in the new Circular, you're going to end up having to provide enough financial and technical support resources to the Federal workers to be able to compete effectively.

I also would note that I believe that 12-month timeframe is a guideline, and it's not hard and fast, but it is ambitious. There's no question about it.

Mr. SHAYS. Let me ask you then, Mr. Walker, what would be some of the risks associated with having agencies complete the competitions in 12 months, as opposed to taking——

Mr. WALKER. Well, I think the real key is that there's no question there are opportunities to streamline and simplify this, but I think the real key is going to be what type of financial and technical support resources are going to be made available in order for people to be able to do this while still doing their regular job.

I mean, after all, people have a mission. I mean, they've got to perform; and to a great extent we're asking employees to be able to do things that they may or may not have the expertise. So they're going to need some technical support in order to try to help compete effectively in and financial resources to back that up.

Mr. SHAYS. Thank you very much.

Mr. WALKER. If that doesn't happen, then, A, we might not get the right answer; or, B, it may be perceived to be unfair, which could have an adverse morale impact, etc., just beyond the affected workers.

Chairman TOM DAVIS. Thank you very much, Mr. Walker.

We have votes going on, but we're going to continue questioning for a few minutes. We've three votes, but I'll go to Mr. Waxman.

Mr. WAXMAN. Thank you, Mr. Chairman.

I appreciate the testimony that the witnesses have given.

Rather than asking questions, I want to state my own feelings about this matter.

Today's hearing is looking at the OMB revised Circular A–76, which was released about 2 weeks ago, on May 29. A–76 governs the processes through which Federal agencies decide whether to privatize responsibilities currently being performed by government employees. And I've said this before: This administration has virtually declared war on Federal employees. It's stripped hundreds of thousands of Federal employees of basic rights such as the right to appeal, unfair treatment and the right to bargain collectively. It has opposed modest cost-of-living increases for rank-and file em-

ployees at the very same time that it has supported large cash bonuses for political employees.

The administration's most direct assault on Federal employees is the effort to terminate Federal jobs and hire private companies to perform this same work. The President's Management Agenda includes a Competitive Sourcing Initiative which would impose privatization quotes on agencies, requiring them to allow private contractors to bid for hundreds of thousands of jobs currently being performed by Federal employees.

I'm not opposed to hiring private companies to perform jobs currently being filled by government employees if the private companies can do the work more efficiently and at a lower cost. In fact, I believe we owe it to the taxpayers to ensure government functions are performed as cost-effectively as possible, but I am opposed to the privatizing at any cost ideology that seems to drive this administration.

We know that Federal employees can often do the work performed by large contractors like Halliburton at a much lower cost than the contractor, but this administration doesn't seem to care. It continues to shower favorite companies like Halliburton, who, incidentally, happens to be a large campaign contributor, with massive contracts at enormous expense to the taxpayer.

If you want another example of the dangers of privatization, just look at the Energy Department. Literally billions of dollars of taxpayers' money has been squandered on private companies at places like Hanford and Paducah.

This is the context in which we have to review the new A–76 process. I'm not opposed to reasonable changes to streamline the process by which agencies decide whether public or private employees can best provide certain services, but I've heard concerns from employee representatives that the new A–76 process simply goes too far. It makes little sense to force agencies to engage in A–76 competitions at the expense of important program priorities, but this is exactly what seems to be happening. For example, the National Park Service says that the costs of running some of these competitions are so large that they could lead to cutbacks in seasonal hiring.

I'm also concerned that the administration may have overstepped its authority by redefining the term "inherently governmental." These are activities that must be performed by governmental personnel. Although the definition is codified in statute, the administration has ignored the statutory language and adopted an overly narrow new definition.

Clearly, these are important issues but complicated issues; and I think the witnesses that we're hearing from today will help us shed some light on them and work through them; and rather than ask any questions of these specific witnesses, I wanted to set out my views and hope that we can examine these issues together.

Chairman TOM DAVIS. Thank you very much, Mr. Waxman.

Let me take just a few minutes, and then what we'll do is recess. I know other Members are going to want to ask questions of this panel, but our problem is our second panel. We have some representatives that have to be out of here by 11:45, I believe, and I

want to give them ample time as well. With the recess, we'll try to move this expeditiously.

One of the things this committee centers on is the interconnection between a strong government work force and an efficient procurement process; and I think we need to be careful in all of—in that in creating a very strong contracting work force and looking at short-term, you know, efficiencies that we can get out that we don't destroy morale of Federal employees who every 3 or 4 or 5 years wonder if their job is going to be up for competition and they may be out on the street. That is a fundamental issue that we need to look at, because we may in fact be getting efficiencies over the short term in terms of the way we do some things, but do we destroy the morale and our ability to hire and retain good people if we hire them, bring them into government and every few years put them up for grabs again just like a contractor?

Let me ask, Mr. Walker, is that a realistic concern? And, if so, how do we address that in this context?

Mr. WALKER. I think you have to be concerned about this. The fact of the matter is, is that you do want to get the best deal. Cost is important, but cost is not everything. It's easy to be able to quantify the cost associated with the public-private competition. It's very difficult to be able to quantify the cost to the taxpayer due to decreased productivity, due to an adverse impact on morale, if there's a perception that these things aren't done fairly.

So I think the key is the panel tried to come up with a set of principles that were unanimously adopted to try to help achieve that balance and also some supplemental recommendations. Because you do have to be concerned about the hidden cost, and this hidden cost is, if you don't do it right or you don't do it in a way that is perceived to be fair, you can have an adverse productivity impact and there is a cost associated with that.

Chairman TOM DAVIS. Right.

Anyone else want to address that issue? Anyone else see an issue there?

Mr. CAMERON. Well, Mr. Chairman. I'll defer to——

Ms. STYLES. No, I think we're very cognizant of the morale issues. It's a very serious consideration. If you look at past history of the Department of Defense where the competition is run well, where you've got people that are allowed to compete in the Federal work force, where it's a fair and level playing field, it is a morale boost to the employees particularly when they win, and they win more than 50 percent of the time. When it's a fair and level playing field and they understand the contractor has proven that they can win this and do this more efficiently, I think the Federal work force accepts that and people are more willing to come—in terms of recruitment people are more willing to come to a Federal Government that is innovative and creative and a place that they believe that they can learn from experiences of the Federal Government.

But I also think that some of the departments here probably have some greater insight than I do into this.

Mr. CAMERON. If I could, Mr. Chairman, I would add morale is as much a communications issue as it is anything else, and it's a real challenge to constantly communicate with our employees what we're trying to do and what we're not trying to do. Competitive

sourcing is all about increasing value for the customer, helping those very dedicated people accomplish their mission more effectively.

If you've been in the Federal service for 20 years in a career capacity, you went through the first Clinton administration's downsizing exercise, where 10 percent of the employees were let go. We went in the early Reagan administration through an outsourcing experience. So, unfortunately, the history that most Federal employees have had is very different from what we're trying to accomplish through competitive sourcing. So communications are a challenge.

Another way to look at is, frankly, a relatively small fraction of our employees are likely to be involved in competitive sourcing over quite a few years. At Interior, less than half of our FTEs are commercial in nature. The White House has said that over the long run, with no deadline on it, only half of those jobs will be studied under competitive sourcing. So a relatively small fraction of our employees will ever be involved in a competitive sourcing study, and yet they're all worried about it.

Chairman TOM DAVIS. Does that hurt recruiting, too? I mean, it used to be one of the things you get with the Federal Government is you would get some kind of tenure to an extent, something—a guarantee you didn't get in the private sector; and that was the tradeoff for not having the stock options and some of the bonuses you could get in the private sector. It seems with this you're taking that away, to some extent.

Mr. CAMERON. Our biggest problem with recruiting, quite frankly, is it takes us 4 months to make an offer to somebody, whereas the private sector can make an offer in 4 weeks or 4 days. So I think that's, frankly, more of a challenge at the recruiting end.

Mr. GRONE. Mr. Chairman, if I might, I second everything that Ms. Styles said with regard to DOD. But the key piece for us and the key part of the reform of the Circular in this record I believe is the emphasis on best value, where we're able to make within certain parameters the ability to trade or weigh cost considerations against other performance considerations; and it's something I think that can be very helpful in this regard to—it's not just simply a cost driver, but it is also efficiency and performance and cost all taken together. That's why for us the ability to use best value in this regard in combination with the other tools is so critically important.

Chairman TOM DAVIS. OK. I've got to go over and vote on the floor, as does Mr. Tierney, as I know he has some questions. I am going to allow Ms. Norton to ask questions and chair the meeting and recess at the conclusion of your questions, and we'll come back and we'll resume with you and then move to the next panel. But I want to get our next panel on because they have to be gone at a certain time and make sure they have their say and we get some questions from them.

So I'm going to hand the gavel—this kind of breaks precedent—to Ms. Norton. I know she won't abuse it; and if she takes over 5 minutes, nobody's here to stop her. So there you go.

Ms. NORTON [presiding]. Tom and I are such good friends that he thinks that I won't seize the gavel and keep it, and that's why

he gives it to me. One of these days it's going to be a revolution, however, in this House.

I think it's my time to ask questions.

During the last administration was the first large decline in Federal employees in generations, and it was huge. It didn't cause a lot of acrimony. It was done with buyouts. It was done with the cooperation with the representatives of the workers. It was done with fairness; and during the time it was done, it seemed to be the way to proceed. It meant that you could downsize your government without upheavals.

Then there developed great controversy because government employees complained that they found they were now sitting with contracting employees, raising questions about whether there had in fact been downsizing; and I would like to question you about the substitution of contracting employees for Federal employees when the government is told that it has—it is indeed reducing costs for government employees. Of course, the last time we heard the government pays for contracting employees the same way it pays for civil servants.

First, I want to know whether you have evidence that there have been employees from contractors who replaced people who were bought out.

Ms. STYLES. Certainly. I can tell you under the old Circular process, the one we changed, there was a direct conversion process. So one particular employee in a smaller function, you could actually directly convert that work to the private sector. So in some respects I think you could say that person was simply replaced by a contractor-employee with little or no documentation for why that choice was made, which is why we have gotten rid of that process.

Mr. WALKER. I think it is important to note that the primary cost savings can occur because of process improvements, because of leveraging of technology, or because of being able to have individuals who are doing work on a just-in-time and as-needed basis, rather than a full-time basis where you may not have the need. So, in fact, even when Federal workers win the competition, their wages aren't cut. What happens is they end up improving the processes. They end up leveraging technology more so that they can do more with, in many cases, fewer people. So, yes, there are circumstances even with—through competitive sourcing where you end up having contract individuals doing basically the same job that——

Ms. NORTON. You do understand that the agencies were forbidden to downsize and then later replace the downsized employees with government employees.

Mr. WALKER. That's with regard to the buyouts and the early outs or whatever.

Ms. NORTON. Yes, after the buyouts.

Mr. WALKER. I understand that. And, as you know, Ms. Norton, that while you're correct in saying that the biggest downsizing, you know, that we've had was during the 1990's and a lot of it was through buyouts and early outs, a lot of it was also through reductions in force. I can tell you GAO was downsized 40 percent, and most of it was due to reductions in force. And the way those rules work they mortgage the future.

Ms. NORTON. Well, yes, the point is the GAO probably needs to know how much we have grown in contracting employees since we downsized and laid off government employees. This kind of seesaws when we then report to the public that there are far fewer government employees does not in fact give a correct picture of what a government employee is. When are we going to tell the public that a government employee, in this day and age, where there is massive privatization, includes people who are contracted and people who are civil servants, and wouldn't that be the fair way to inform the public, who pays the taxes for both?

Ms. STYLES. We do have extensive public data available on the contracts that each department and agency has, and we actually look at those as we determine what's appropriate in competitive sourcing for a particular department and agency.

HUD, for example, you can see a clear trend of decline in employees and an increase of contract dollars going out the door, and you also see them being on the high-risk list for contract management. That's an agency that we have to be very cautious in our approach to competitive sourcing because of the trends you see there.

Ms. NORTON. Tightly managed government employees, contracting employees not held to the same standards; and that, of course, begins to bother people when you consider that it's taxpayers' money we're talking about. Somehow I would like——

You know, the Supreme Court has once again declared that quotas should never be used. I'm a former chair of the Equal Employment Opportunity Commission, did affirmative action, always without quotas, have never believed in quotas even to make up for past discrimination unless you find a case of deliberate discrimination. The courts have been—of course, sanction quotas; and the theory is the correct one, that if you use a quota or an absolute number of any kind you will be inclined not to judge on the basis of qualifications.

Now, when it comes to privatization we're looking for efficiency. For the life of me, I'd like to have you explain to me, particularly in this anti-quota Congress, and as the Supreme Court has decried quotas for reasons that I think most people would agree, why—how you could justify the quotas that you now have for privatization.

Ms. STYLES. We don't have privatization quotas.

Ms. NORTON. You have to elaborate on that.

Ms. STYLES. We set some goals.

Ms. NORTON. So you now reduce the quotas to goals, and what does that mean?

Ms. STYLES. We never have had quotas. We have never had quotas for privatization. We've asked agencies to build an infrastructure for public-private competition being agnostic as to who wins, to put these up for competition, not to privatize these, not to outsource them, to actually build an infrastructure at their agency that recognizes the management efficiencies that can be created by a public-private competition.

We've sat down with 26 major departments and agencies over 2½ years. We've developed detailed, tailored plans for the departments and agencies that we adjust every quarter. It recognizes their mission needs and what's appropriate for their agency in terms public-private competition.

Some agencies will have more competitions than others in the near term. Some agencies have been able to build infrastructure faster than others. Some agencies will move forward.

We still have in place aggregate governmentwide goals, that we would like to see 15 percent aggregate governmentwide competed, but that is not arbitrary. It's not a quota. We work with each department and agency to determine what is appropriate for them over a short period and over a long period.

Ms. NORTON. Mr. Walker.

Mr. WALKER. When the administration first came in. They had certain goals, 15 percent and 50 percent targets.

Ms. NORTON. You know good and well they were absolute numbers. And she's testified, and we all saw them. You know, you're before a committee where you have been sworn. We all saw those absolute numbers. They were absolute percentages. I don't know what you have now, but the way in which to be truthful to this committee is to say, well, we did have absolute numbers, a 15 percent quota; we don't have them now.

That's all right. I've heard you. Let me hear Mr. Walker.

Mr. WALKER. Let me try to—my opinion—as you know, I work for GAO, not the administration.

Ms. NORTON. I understand that perfectly.

Mr. WALKER. And so, therefore, I believe at least my perspective is—in this is the administration had 15 percent and 50 percent goals. They weren't quotas. They were perceived to be quotas. Some viewed them that way. They were arbitrary. They came out of the campaign. They were not considered numbers.

Quotas are inappropriate. Period. Goals are inappropriate if they're arbitrary. Goals may be appropriate if they're a result of a considered process and, you know, a reasoned approach. So, in reality, what's happened is that they modified how they're approaching this now and are approaching it in a different manner than they were before.

Ms. NORTON. I think that would have been a truthful answer.

Mr. GRONE. Ms. Norton, if I may.

Ms. NORTON. Yes.

Mr. GRONE. From a DOD perspective, if I could put some of this in the context of what our experience has been in the last 3 years with regard to the agenda as we've worked it through with OMB—you referred to them as quotas. We concur that it was a considered process. It's not a quota. There were goals.

But the way in which they were managed is that those goals were built off of inventories that identified which functions were to be inherently governmental and which were commercial, a rigorous process outlined by statute to develop an inventory that laid out what were the positions and what bins in which they should be put.

Over the last 3 years, as we have gone through our exercises to get to compete, over 71,000 FTEs in this process, we generated a savings number of roughly five—nearly $5½ billion as a result of that.

I went back and asked the staff, put those in appropriate bins for me—contract, in-house, FTEs—as a number, just a discrete competition. What we found just in this 3-year pattern—and it's

not necessarily elaborative of the whole Federal Government or what will be in the future—but what we saw was that, over this 3-year period, for the positions that we had competed as discrete numbers of the competition, 70 percent of those were won by the in-house work forces.

The MEO looked at from the perspective of FTEs. It was 60 percent were won by the in-house MEO. In terms of the savings, when the contractor wins, it resulted in 47 percent savings, real money, to help the Department of Defense meet its mission needs; when the in-house won, it was 27 percent savings; and in the overall aggregate, it was 40 percent over this 3-year period for us.

So whether one wants to look at them as goals or however one wants to look at them, these are real targets based on a considered discussion of what the inventory ought to look like, a process that we went through, fairly rigorously, that yielded real savings and real efficiencies. The processes in the reforms that have been put into place by OMB will allow us to buildupon these successes to consider performance of both the in-house and the contract in the future that provides incentives for both the contract and the in-house work force to continue to improve efficiency over time, and that's to the benefit of all.

So, from the perspective of the Department of Defense, that's why we believe so firmly that this process is going to yield us a good result and that it is based on a considered evaluation of what ought to be the essential functions that ought to be competed, not that we have a target that you must outsource a certain number of people or a certain amount of functions, but that they be subject to the rigors of competition and that then gives us the best result.

Ms. NORTON. I think Mr. Cameron wanted to say something before we——

Mr. CAMERON. Yes, very briefly. Whether one calls these numbers—goals or targets or quotas or something else—I do think it's important to focus on what they represent, and what they represent are studies that need to happen. There's no preconceived notion on anyone's part what the outcomes of these studies might be. So these are not numbers that represent privatization goals or privatization targets. They are management goals for getting a number of analyses done; and the numbers, the results of those analyses will speak for themselves in terms of what's best for the employee, what's best for the customer, what's best for the taxpayer.

So thanks.

Ms. NORTON. Yes. The reason that the distinction has come to be very important legally, and it is very important managerially. If a manager thinks that if he really makes the 15 percent privatization his own rating will be better than if he makes 10 percent, he is perhaps more likely to press it.

You're speaking to somebody who, unlike you, had to use numbers under the inspection of the Supreme Court of the United States and who successfully used them and indeed—so that you do not find me saying that numbers are inappropriate. I don't think that you can know whether you have succeeded if you don't measure and if you don't set some kind of goal.

The need to be careful when dealing with—forgive the word—bureaucrats or managers or people who are on the Federal work force

who do, unlike contractors, get measured, get evaluated by everything they do, the fact is this administration put out this number. These numbers caused huge consternation throughout the work force. The managers weren't trained as to how to handle these numbers.

So there really is a difference between—in the United States, people still don't understand the difference between goals and quotas. They see a number, and that's what it's supposed to be. It is a very delicate concept.

You see what we do when we have, quote, numbers or goals for parking tickets in my district. I mean, you will send people out of their skulls, even if the government or the District of Columbia, overcrowded with cars from throughout the region and the District of Columbia, says, look, you all are not doing your job if you don't bring in what—you've got to be careful about telling them what to bring in and how to go about doing it and how that you'll then authorize them so that the number, which is the only absolute thing up there, doesn't take control.

So, you know, I found Ms. Styles' answer absolutely ingenuous. It seems to me you have to have a sensitivity for what numbers can mean to a manager or a supervisor, and then you go forward. You admit you used numbers. They are perfectly valuable to use. But then you show the kind of sensitivity for what you have to do to make sure that they don't run away with the whole process.

Mr. Walker, I wish you would get back to this committee with any clarification you could give us on a statistic that has come from a credible source. Doctor Paul Light, who is a senior fellow at the Brookings Institution, estimated—now this figure goes back to 1999. We're in 2003. But he said that in 1999 the government had a contract work force of 5.6 million employees, compared to 1.9 Federal employees.

To me, that means a shadow work force has taken over the Federal Government; and until we know—and it can be perfectly legitimate. The only question is we ought to know what the real number is. Until we know, and we ought to know, if that's what we're doing, then we ought to do it consciously, and we ought to know we're doing it.

So I would ask you to get back to the chairman and the ranking member with any—I'm not asking you to do a study, understand—but with any information you could give to us as of 2003. What is the best estimate you can give us of the contract work force—remember, 5.6 million is what Dr. Paul Light says—and what is the best estimate of the civil service work force of the United States at this time.

Mr. WALKER. We'll do what we can.

As you know, Paul Light is on one of my advisory boards. I'm very familiar with his work.

I think one of the things we have to be careful of is to make sure that we're getting the right answer, and one of the things we have to be careful of is not to have arbitrary goals or not to have any quotas with regard to FTEs. I mean, that's part of the problem. And there have been situations in the past where either the executive branch or, frankly, the Congress has set limits on what that should be, which may end up pushing certain decisions that may

not make sense for the taxpayer. So I think it goes both ways. It's not only with regard to what should be done by contractors but whether or not there's the flexibility to be able to hire Federal workers in circumstances where that is in the interest of the taxpayer and the country.

Thank you.

Ms. NORTON. Thank you.

Before I recess this matter, I want to indicate that, in talking about contracting employees controversy they have done, this has not been a Republican or a Democratic matter. The contracting work force has grown inexorably through Democratic and Republican administrations. It may have grown more during the last 8 years of a Democratic administration than any other administration.

So this is not a—it doesn't—somebody must believe that contracting is better for the Federal Government, because it is a bipartisan matter now. And no one would believe that you could ever turn the Federal Government or, for that matter, most local governments around to go all the way back to civil-service-dominated work forces. That really isn't the question.

The question is—and you move us perhaps somewhat toward this goal. The question is understanding what we're doing, being forehanded about what we're doing, not making the assumptions that have been routinely made that a contracting worker, one, will cost you less.

GAO did a study some years ago that showed that was not the case in a number of agencies, one, that a contracting employee will cost you less; and, by the way, nobody even cared whether the contractor or the contracting employee was as efficient. That was beside the point.

So the drive has been to drive down the cost of government and the assumption and I—and the operating word here is assumption—is that you were saving the government money that way. When you grow the way we've grown, it is your burden to show both that you improve efficiency and that you save the government money, and I hope we're on course to do that now.

I want to thank this panel. I found it a very enlightened panel, and I know I speak for the entire committee when I say I appreciate the work you have done to prepare this testimony.

We are in recess.

I am told by staff that there was a member who still had questions for this panel. Could I ask the full members of this panel to stay? Therefore, catch whoever is trying to get out of the door. There was a member who was promised that he would be able to ask questions.

So we're in recess.

I thought the chairman wanted to change panels, but I am informed that there is a Member that is on his way back from voting who actually has questions of this panel. So please remain. I mean, you don't have to sit in those chairs, but don't leave—your panel isn't over yet.

[Recess.]

Chairman TOM DAVIS [presiding]. The panel will take their seats.

I'm going to recognize the gentleman from Massachusetts for questions, Mr. Tierney.

Mr. TIERNEY. Thank you, Mr. Chairman.

I want to associate myself with the remarks of the ranking member, Mr. Waxman, and some of the concerns the chairman made earlier. I don't want to re-cover old ground, but I am concerned with some of the exercise of discretion that seems to be left. I am wondering if some of you might be able to talk to me a little bit about the change in definition from the active governing being a discretionary exercise of government authority to now propose a substantial discretionary exercise and what was the reason for that change and what do you think the impact of that change will be.

Ms. STYLES. If I can start, because I personally made that—reviewed that decision. If you go back and you look at the policy of the executive branch since at least 1992, it has said substantial exercise of discretion in our policy letter 92–1. Within the same policy letter, which—this policy letter defined how an agency would determine whether something was inherently governmental or commercial. Within the same policy letter that said substantial exercise of discretion, there was another statement in there that said exercises of discretion. There was an apparent conflict on its face within this policy letter, and we discuss it extensively in the preamble to the final A–76 Circular because it was raised in the comments which caused me to actually go back and look at the FAIR Act to look at our policy letter and to look at what we had finally written into the final Circular. Based on that, we decided to use the standard substantial exercise of discretion that had been there since at least 1992.

Mr. TIERNEY. Come again on that. You used the standard—the last sentence you made, I am not sure I entirely heard it. The standard——

Ms. STYLES. The standard for determining if something is inherently governmental or not.

Mr. TIERNEY. And you put substantial in there.

Ms. STYLES. No, we did not. We retained the standard, the substantial exercise of discretion, that had been in our policy since at least 1992, if not before.

Mr. TIERNEY. My concern is that, besides being sort of a beancounting exercise of this whole thing, where it gets incredibly complex, costly or whatever, is that there is a lot of individual discretion or the exercise of judgment that's down there that's just ripe for abuse or error.

I look particularly at the incident of the Affiliated Computer Services case within the Department of Defense where the problem was that an error was made. It was a human error that was made, as opposed to process; and then the OMB suggested the remedy for that was that the agency should consider allowing the employees to go through the process again. The problem is, by the time they discovered the error there were no more employees.

So, in an instance like that, who then is going to be able to remedy it and who's going to be able to then put together a proposal for what the cost of the employee would be to compete with the others. Has anybody thought about how do we avoid other situations like that?

Ms. STYLES. Yes, we thought about that extensively in our rewrite of the Circular.

The old Circular was so complex I think there was a lot of room for human error. And that's what that was. It was human error, and I think it was very unfortunate.

What we wanted to do—you could write 500 more pages of Circular and still have that human error occur. The DOD IG missed it three separate times when they looked at it, which meant the Circular was too complex, too hard to understand. We really tried to go back and avoid human error by having a Circular that was easier to understand, that was transparent to you, to the public, and to us and held the agencies accountable for the decision they made.

I can't promise you that errors won't happen under the new Circular, but, hopefully, by it being easier to read and understand and streamlined, transparent, very public about the decisions we're making and why we made them that we will avoid these in the future.

Mr. TIERNEY. Well, I think it gets back a little bit to Mr. Walker's point earlier that, in order for us to be sure of that, then the employees have to have the opportunity, they have to have the resources, the expertise and the funding.

Mr. Walker, are you comfortable within this recommended policy, that those things exist? To make sure that we root out those errors.

Mr. WALKER. I think it's unclear as to whether or not the financial and technical resources are going to be available. I think it's critically important that they be available in order to be able to hit the expedited timeframes in order for this be to be perceived to be fair.

In that regard, Mr. Tierney, one of the things that I would suggest is the administration has put forward a several hundred million dollar fund that originally was proposed for performance-based compensation. I would respectfully suggest that most Federal agencies aren't in a position to effectively adopt that yet, and Congress should give consideration to using that fund to be made available to agencies who make a business case to either compete effectively in public-private competitions and also to try to create high-performing organizations in the vast majority of government that will never be subject to public-private competitions. I think that's something Congress needs to seriously consider; and we're encouraging OMB to do that, too.

Mr. TIERNEY. Thank you. That's an excellent recommendation, and I hope we look into that.

Mr. Chairman, one last question, just generally, is I'm looking at the IRS situation in particular and looking at the fact that this competition—some of that work obviously might be outsourced, and besides the question about whether or not they're dealing with a collection of moneys and transfers of money and things of that nature, what about the risk that we stand of not only having that outsourced to somebody in this country, a company over there, but outsourced—the work outsourced to another country so we are actually taking the jobs elsewhere? What are we doing to guard against that?

Ms. STYLES. Our procurement system—unless it's a national security procurement, the general rules of our procurement system which we try to follow in public-private competition are not, in most instances, going to look to where the work is performed. It's going to be looking at whether it is performed and what the cost is.

Mr. TIERNEY. That's why I point that out. We are in a serious crisis in this country of our jobs being exported just for a race to the bottom. You know, the idea of anything can be done cheaper if you just send it over. With technology today, I think we've got to be very, very careful about that; and, hopefully, we can do something in the context of this legislation and others about protecting against that.

One of the reasons why I really hesitate to even put this process in place is at least we know the jobs now are where they're at, and we've got to—how many lost jobs, you know, like millions of the lost jobs out there that we're not doing a very good job of recapturing at the moment, and I think we ought to protect that.

Chairman TOM DAVIS. The gentleman's time has expired.

There may be other questions for this panel. I have some. I may do it later.

But I want to get to the next panel simply because we have some key members of that panel that have to be out of here at 11:45. So, if there is no objection, let me thank all of you for coming. Appreciate all of your efforts and, you know, we will be—this is just the beginning of a dialog on this. We'll move to the next panel. Thank you very much.

We have Bobby Harnage, national president, American Federal of Government Employees; Colleen Kelley, president of the National Treasury Employees Union; Donald Dilks, the president of the DDD Co. located in Landover, MD, who is here on behalf of the Contract Services Association; and Stan Soloway, president of the Professional Services Council.

It's our policy all witnesses be sworn in before you testify. So I am going to ask you to rise with me and raise your right hands.

[Witnesses sworn.]

Chairman TOM DAVIS. Thank you.

I'm going to give the Chair over to Mrs. Davis for about 5 or 10 minutes. I will be back for questions. I've read the testimony so—and I've got to work with Mr. Waxman on something we're doing this afternoon. But I will be back in time for questions.

We'll start, Mr. Harnage, with you. I understand you have to be—leave at 11:45, is that correct? OK. You know the rules.

So thank you very much for being with us. I know this is an important issue to all of you, and it is an important issue to us.

Mrs. JO ANN DAVIS OF VIRGINIA [presiding]. Mr. Harnage, we can begin with you.

STATEMENTS OF BOBBY L. HARNAGE, SR., NATIONAL PRESIDENT, AMERICAN FEDERAL OF GOVERNMENT EMPLOYEES; COLLEEN M. KELLEY, PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION; DAVID D. DILKS, PRESIDENT, DDD CO., LANDOVER, MD, ON BEHALF OF THE CONTRACT SERVICES ASSOCIATION OF AMERICA; AND STAN Z. SOLOWAY, PRESIDENT, PROFESSIONAL SERVICES COUNCIL

Mr. HARNAGE. Thank you, Madam Chairman.

My name is Bobby Harnage, and I'm the national president of the American Federal of Government Employees, representing some 600,000 workers who serve the American people across the Nation and around the world. I want to thank you for the opportunity to appear this morning on the hearing on the new OMB Circular A–76.

This is a political agenda driven by campaign contributions and has nothing to do with better government or a more efficient or more effective government. The entire process is for the benefit of the contractors; and where there is a conflict, taxpayers come in last every time. I will leave the details to my written statement for the record.

However, I would like to take my time to at least list the 12 most significant concerns AFGE has about the new A–76:

It would aggressively emphasize a second-rate competition process that makes the Most Efficient Organization optional as well as impractical and eliminates a requirement that contractors at least promise appreciable savings before work is contracted out.

It would, if a recent Department of Defense Inspector General's report is to be believed, significantly overcharge Federal employee bids for overhead. In fact, it would double-charge Federal employee bids for some indirect personnel costs, while not charging contractors for indirect labor costs incurred by agencies through contract administration.

It would do nothing to prevent contracting out from being done to undercut workers in their pay and their benefits and continue to turn back the clock on the diversity of the Federal work force.

It would introduce a controversial and subjective best-value process that is as unnecessary as it is vulnerable to anti-Federal-employee bias.

It would impose absolute competition requirements on Federal employees for acquiring and retaining existing work—but not for contractors.

It would hold Federal employees absolutely accountable for failure through recompetition—but not contractors.

Contractors—but not Federal employees and their union representatives—would have standing before the General Accounting Office and the Court of Federal Claims.

It would further narrow the definition of "inherently governmental."

It would, with the privatization quotas, emphasize privatization at the expense of all other methods to improve efficiency.

It would not ensure that Federal employees could finally compete for new work and contractor work.

It would not require anything new with respect to tracking the cost and quality of work performed by contractors.

And it would hold Federal employees, in almost all cases, to 5-year contracts—but not contractors—and allow contractors—but not Federal employees—to win contracts on the basis of how much time they spend, instead of what they actually accomplish.

Those are the 12 main parts of the OMB Circular A–76 that we find most objectionable. I thank you for the time to appear before this committee today and for this committee holding this hearing and look forward to answering your questions.

Mrs. JO ANN DAVIS OF VIRGINIA. Thank you, Mr. Harnage.

[The prepared statement of Mr. Harnage follows:]

STATEMENT BY

BOBBY L. HARNAGE, SR.
NATIONAL PRESIDENT
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

BEFORE

THE HOUSE GOVERNMENT REFORM COMMITTEE

REGARDING

THE NEW OMB CIRCULAR A-76

ON

JUNE 26, 2003

SUMMARY OF AFGE'S CONCERNS WITH THE NEW OMB CIRCULAR A-76

1. It would retain direct conversions, albeit shifting authority to the Office of Management Budget, and aggressively emphasize a second-rate competition process that makes the Most Efficient Organization optional as well as impractical and eliminates a requirement that contractors at least promise appreciable savings before work is contracted out.

2. It would, if a recent Department of Defense Inspector General's report is to be believed, significantly overcharge federal employee bids for overhead; in fact, it would double-charge federal employee bids for some indirect personnel costs, while not charging contractors once for indirect labor costs incurred by agencies through contract administration.

3. It would do nothing to prevent contracting out from being done to undercut workers on their pay and benefits and continue turning back the clock on diversity in the federal workforce.

4. It would introduce a controversial and subjective "best value" process that is as unnecessary as it is vulnerable to anti-federal employee bias.

5. It would impose absolute competition requirements on federal employees for acquiring and retaining existing work—but not contractors.

6. It would hold federal employees absolutely accountable for failure through recompetition—but not contractors.

7. Contractors—but not federal employees and their union representatives—would have standing before the General Accounting Office and Court of Federal Claims.

8. It would further narrow the definition of "inherently governmental."

9. It would, with the privatization quotas, emphasize privatization at expense of all methods to improve efficiency.

10. It would not ensure that federal employees could finally compete for new work and contractor work.

11. It would not require anything significantly new with respect to tracking the cost and quality of work performed by contractors.

12. It would, with the House defense authorization bill, hold federal employees, in almost all cases, to five-year contracts—but not contractors—and allow contractors—but not federal employees—to win contracts on the basis of how much time they spent, instead of what they actually accomplished.

I. INTRODUCTION

My name is Bobby L. Harnage, Sr., and I am the National President of the American Federation of Government Employees. Thank you for the opportunity, Mr. Chairman, to testify this morning before the House Government Reform Committee about the revised OMB Circular A-76.

Before proceeding any further, it is important that the revisions to the circular be reviewed in the context of the Office of Management and Budget's (OMB) privatization / "Proud to Be!" quotas, which charge all agencies with reviewing for privatization at least 50% of all activities performed by federal employees that are categorized as "commercial" as well as the Federal Acquisition Regulation (FAR), which has been severely criticized for failing to ensure that contractors actually compete against one another to acquire and retain their contracts.

Contractors have openly predicted that OMB's rewrite of the circular would allow them to win more competitions against federal employees than ever before. In fact, a contractor analyst who spoke at a Contract Services Association of America event last year declared that the new A-76 could allow contractors to win 90% of public-private competitions. Contractors have every reason to be pleased with the results of OMB's A-76 rewrite.

I appreciate the time that Office of Federal Procurement Policy Administrator (OFPP) Angela Styles spent discussing with AFGE the changes she was making to A-76. She has proven to be more accessible and competent than all of her predecessors in the previous Administration, combined. However, access is not the same as influence; and, ultimately, the new A-76 must be judged on whether it holds contractors accountable to the taxpayers and is fair to federal employees. And the new A-76 fails, utterly and absolutely, on both counts.

II. AFGE'S CONCERNS WITH THE NEW OMB CIRCULAR A-76

Here is a summary of AFGE's most significant concerns with the new OMB Circular A-76.

1. The new A-76 would emphasize a second-rate competition process, which was rejected even by the Commercial Activities Panel's (CAP) pro-contractor majority. Using a "streamlined" competition process, agencies would be encouraged to perform quick-and-dirty competitions in as few as 90 days. The use of the most efficient organization process (the in-house bid) would be purely optional, and the minimum cost differential would be eliminated, in defiance of the CAP's recommendation, for which both OMB and the contractors voted.

2. Despite concerns raised by the Department of Defense Inspector General (D-2003-056), the rewrite leaves in place the controversial 12% overhead rate imposed against all-in-house bids. According to the Inspector General, the 12% overhead rate is "unsupportable...a major cost issue that can affect numerous competitive sourcing decisions...Unless...a supportable rate (is developed) or an alternative method to calculate a fair and reasonable rate, the results of future competition will be questionable." Moreover, the new A-76 would wrongly inflate the costs of in-house bids by subtly charging federal employees twice for indirect labor costs. At the same time, contractors are not charged to the actual extent of indirect agency labor costs associated with contract administration.

3. The new A-76 will continue to encourage work to be contracted out in order to provide those who perform the federal government's work with inferior pay and benefits. Moreover, according to the Departments of Transportation and Veterans Affairs, as well as the National Park Service, OMB's privatization agenda is destructive of the diversity of the federal workforce and has a disproportionate impact on women and minorities.

4. The new A-76, through the introduction of a subjective and unprecedented "best value" process, will allow contractors to win awards even when they submit more expensive and less responsive bids than federal employees.

5. The new A-76 imposes absolute competition requirements on federal employees for acquiring new work and retaining existing work—but not contractors.

6. The new A-76 holds federal employees absolutely accountable for failure, but not contractors.

7. Under the new A-76, federal employees would have standing only for purposes of an internal agency appellate process—but not for the GAO or the Court of Federal Claims, like contractors. Federal employees would lose their ability to contest any decision involving the "streamlined" competition process, while contractors would continue to be able to protest those same decisions to the GAO and the Court of Federal Claims.

8. Under the new A-76, it would be even easier to privatize work now categorized as inherently governmental.

9. Under the new A-76 and the OMB quotas / "Proud to Be!" goals, privatization would be used to the exclusion of all methods of improving operations (i.e., strategic sourcing).

10. Under the new A-76 and the OMB privatization quotas / "Proud to Be!" goals, federal employees are scheduled to compete for only a tiny handful of contractor jobs. In fact, in OMB's "Proud to Be!" scheme to implement the President's Management Agenda, goals are established for conducting arbitrary numbers of competitions in arbitrary periods of time. However, no goals are imposed for specifically ensuring that federal employees are finally allowed to compete for new work and contractor work.

11. Despite the Administration's contention that the OMB privatization quotas and the A-76 rewrite are all about saving money for taxpayers, tracking the costs of work given to contractors is accorded the usual short shrift. In fact, in OMB's "Proud to Be!" scheme to implement the President's Management Agenda, goals are established for conducting arbitrary numbers of competitions in arbitrary periods of time. However, no goals are imposed for the establishment of reliable and comprehensive systems for ensuring taxpayer dollars entrusted to contractors are well spent. The emphasis is on turning the work over to contractors, not in making sure the work is done right. More significantly, agencies receive no additional resources to better administer contracts at the same time OMB is imposing the onerous privatization quotas.

12. An already unfair competition process threatens to be made even more inequitable by provisions in the House defense authorization bill (H.R. 1588). Section 1431 would allow agencies to repeatedly roll over contracts, thus allowing contractors to avoid recompetitions. At the same time the A-76 rewrite would force federal employees to be recompeted at least once every eight years, and almost always every five years. Section 1442 would allow contractors to be given time and materials contracts and labor-hour contracts, which pay contractors on the basis of their time, rather than their achievements. On the other hand, federal employees, under the new A-76, would be held to strict, results-based performance agreements.

Here is a detailed discussion of each of those twelve concerns:

1. EMPHASIS ON A SECOND-RATE COMPETITION PROCESS, WHICH WOULD BE REJECTED EVEN BY THE COMMERCIAL ACTIVITIES PANEL'S PRO-CONTRACTOR MAJORITY

In March 19 testimony before the Senate Armed Services Subcommittee on Readiness and Management Support, Ms. Styles acknowledged that "Our concern certainly has been, over the last two years, that agencies have made decisions to directly convert that may not be in the best interest of the taxpayer. We do not want that to continue." Of course, it is precisely because of the OMB privatization quotas, which explicitly encourage direct conversions, that the direct conversion authority has been abused.

Contrary to OMB's protestations, direct conversions, giving work performed by federal employees to contractors, are still a part of OMB Circular A-76. The difference is that authority has shifted from the agencies to OMB. As a contractor lobbyist told *Federal Computer Week,* on June 13, "OMB does have the authority to say yes, you can do it (undertake a direct conversion)," he said. "That used to be at the discretion of the agency. Now, it's at the discretion of OMB."

And despite the circular's insistence that "agencies shall convert...direct conversions to streamlined or standard competitions under this revised circular," OMB officials are encouraging agencies to petition OMB for authority to give work performed by federal employees to contractors without any public-private competition. As was reported in GovExec.com on June 2, 2003, "(Office of Federal Procurement Policy Administrator Angela) Styles emphasized that agencies should contact OMB if they are having trouble...and said that exceptions to the conversion requirement are possible. The Defense Department has about 30 direct conversions that were nearing completion, and that could be affected by OMB's rule change, according to Joe Sikes, director of Defense's office of competitive sourcing and privatization. Sikes will soon meet with competitive sourcing officials from the military services to discuss how to handle these direct conversions, he said. `If there are some that are too close [to completion] we might call [OMB] and try to work out some kind of accommodation,' he said."

Moreover, mechanisms to give work performed by federal employees to contractors outside of OMB Circular A-76, including the infamous Native American direct conversion process, have not gone away.

Publicly, however, OMB officials are emphasizing the use of "streamlined" competitions in lieu of direct conversions. "Streamlined" public-private competitions under the revised circular are very different from traditional public-private competitions. Any activity involving 65 or fewer employees could be subjected to a "streamlined" process, which would last no longer than 90 days, except in extraordinary circumstances, when they could last no longer than 135 days.

The use of "streamlined" competitions in place of direct conversions was pioneered last year by the Department of Interior (DoI). Significantly, DoI developed a "streamlined" competition process to avoid having to directly convert functions involving ten or fewer employees. According to a DoI official, in a GovExec.com posting on April 8, 2002, "The methodologies typically available in OMB Circular A-76—full studies, streamlined studies, or direct conversions without further consideration—don't appear to meet our culture and our commitment to our employees very well. So part of our intent here is to provide our managers with a tool *they can use to consider the 10-or-less situation without making that pre-emptive decision to contract.*" (Emphasis added)

OMB, however, would take that limited streamlined approach for avoiding de minimis direct conversions and encourage it to be used in lieu of real competitions for any function involving 65 or fewer employees.

There are two extremely important differences between a "streamlined" competition and a standard competition under the revised circular:

a. The Most Efficient Organization (MEO) would be optional for the "streamlined" competition, per page B-4. The MEO is the in-house bid; it is a way for managers and employees to improve upon the status quo by changing how they deliver a service, instead of being stuck with the current arrangement. If we are really interested in using public-private competition to make federal agencies more efficient, as opposed to just enriching contractors, then it is imperative that we let in-house workforces submit their most competitive bids.

   Even the pro-contractor CAP insisted, on page 50, in its recommendation, which was approved by contractors and Bush Administration officials, that any replacement to the current competition process include "the right of employees to base their proposal on a more (sic) efficient organization, rather than the status quo." There was no exception to this right for functions involving 65 or fewer employees.

   Moreover, even if an in-house workforce is allowed to form an MEO as part of a "streamlined" competition, OMB officials acknowledged that it is all but impossible to pull off in as few as 90 days, and certainly not in a manner that would give federal employees fair chances to compete in defense of their jobs.

b. There would be no minimum cost differential, which requires the challenger, whether in-house or contractor, to be 10% or $10 million more efficient than the incumbent, whether in-house or contractor. Because there is a cost associated with conducting a competition, as much as $8,000 per employee reviewed, according to the March issue of *Government Executive*, and in transitioning the work, it has always been required that there be appreciable savings before moving work back and forth between the federal sector and the contractor sector.

   Again, even the pro-contractor Commercial Activities Panel (CAP) insisted in its recommendation, on page 50, which was approved by contractors and Bush Administration officials, including Ms. Styles, that any replacement to the current competition process include "the A-76 conversion differential factor (10 percent of in-house personnel costs or $10 million, whichever is less) (which) would apply to whichever sector is currently performing the work..." Again, there was no exception to this requirement for functions involving 65 or fewer employees.

The old circular, on page 31 of the Revised Supplemental handbook, contains a very rarely used "streamlined" cost comparison process for functions involving activities with 65 or fewer employees. Its relative unimportance in the old circular is shown by its location in the handbook: at the very end, right before the Appendix. DoD reported to the CAP that, between FY1997 and FY2001, it used the streamlined process on 1/37 of all the civilian and military positions reviewed under OMB Circular A-76. In contrast, the "streamlined" competition process is discussed in the revised circular before the traditional competition process, which makes sense because it is clear that agencies will be expected to use it much more frequently, particularly in the absence of agency authority for direct conversions.

Even so, there are several important ways in which the revised circular changes the "streamlined" process for the worse:

a. The "streamlined" process in the old circular included a minimum cost differential, on page 31. As discussed above, the revised circular does away with the minimum cost differential for "streamlined" competitions, in defiance of the CAP's pro-contractor recommendation.

b. The "streamlined" process in the old circular, on page 31, prohibits "any commercial activity involving 66 or more employees (from being) modified, reorganized, divided or in any way changed for the purpose of circumventing" the requirement to conduct real public-private competitions for activities of that size. Such a prohibition is strangely absent from the new A-76.

c. The "streamlined" process in the old circular could only be used on certain simple activities (e.g., custodial, grounds, guard, refuse, pest control, and warehousing services) that are commonly competed, competed largely on the basis of labor and material costs, and which don't require significant purchases of capital assets. Use of the old "streamlined" process was limited because it was so quick-and-dirty. In contrast, the revised circular's "streamlined" competition process can be used on any activity, no matter how complicated.

d. The "streamlined" process in the old circular, on page 31, requires the contracting officer to "develop a range of contract cost estimates, based upon not less than four comparable service contracts." In contrast, the revised circular would allow a contracting officer, on page B-4, to determine an estimated contract price merely by using "documented market research" (which includes, declared Ms. Styles, at a recent event at the Heritage Foundation, calling a contractor for a quote). This loosey-goosey "market research" is particularly prone to abuse when the minimum cost differential is dropped.

e. The "streamlined" process in the old circular need not be finished in time to meet an arbitrary deadline, unlike the "streamlined" process included in the revised circular. Please note that DoD reported to the CAP that the typical streamlined cost comparison process took "20 months regardless of size." OMB would point out that the "streamlined" process in the revised circular would allow an agency to switch to a traditional competition if a "streamlined" competition is not completed by the arbitrary deadline. However, because of the mad rush inspired by the OMB privatization quotas, agencies have little incentive to avoid conducting quick-and-dirty competitions. The emphasis in agencies is on meeting the onerous OMB privatization quotas, not using a thoughtful and careful approach that yields the best deal for taxpayers and customers.

f. The internal appellate process, the only one available to federal employees, cannot be used, per page B-20, to challenge any decision made by management pursuant to the "streamlined" competition process. While also unable to contest a "streamlined" competition process, a contractor could still protest a "streamlined" competition process to GAO and the Court of Federal Claims.

It should be noted that a meritorious amendment offered last month by Representative Chris Van Hollen (D-MD) to the Services Acquisition Reform Act would have ensured that federal employees could have always competed in defense of their jobs, absent compelling national security and homeland security reasons, under principles that had even been endorsed by the pro-contractor CAP. However, the amendment was narrowly defeated.

2. CIVILIAN EMPLOYEES ARE SIGNIFICANTLY DISADVANTAGED BY HOW COSTS ARE CALCULATED

The new A-76 would continue to impose, on page C-20, a 12% overhead cost factor on all in-house bids, which is said to "include costs that are not 100 percent attributable to the activity being competed but are generally associated with the recurring management or support of the activity."

The Inspector General determined in the report D-2003-056 that not a single cent of the $33.7 million of the 12% overhead cost factor charged against an in-house bid for military retired and annuitant pay functions in a Defense Finance and Accounting Service (DFAS) public-private competition was legitimate because those overhead costs would not change, whether the activity was performed by civilian employees or a contractor. The Inspector General recommended that DoD devise a more accurate overhead cost factor or develop alternative methodologies to allow overhead to be calculated on a case-by-case basis.

DoD officials were "non-responsive" to these recommendations, according to the Inspector General. There is nothing unique about the DFAS activity that was being reviewed with respect to its scope or nature. Consequently, the current circular may include a systematic inequity against in-house bids that artificially inflates overhead costs, thus giving contractors an unfair advantage.

But it gets worse. The November draft added a second charge for indirect labor, although such costs are already included in the 12% overhead cost factor. As the Department of Energy pointed out, "(T)his requirement would appear to require double counting of costs that should largely be captured in the 12% Overhead Factor applied to the Government's in-house bid." OMB took out the "Indirect Labor" section in the new A-76. However, OMB kept the redundant indirect labor charge by combining the "Direct Labor" and "Indirect Labor" sections into a "Labor Costs" section, on page C-7, which includes "indirect labor" related to "supervision and management" of the MEO.

At the same time, the revised circular would not charge contractors for their own overhead of agency indirect labor costs. Costs associated with contract administration are charged against contractors' bids, on page C-22—but not the indirect labor costs associated with contract administration, e.g., managers and supervisors above the first line of supervision in the organization responsible for ultimately overseeing the contract administrators, human resources personnel who hire the contract administrators, the comptroller who tracks the costs of the contract administrators, the general counsel who represents the legal interests of the contract administrators, etc.

3. PERPETUATES THE HUMAN TOLL FROM CONTRACTING OUT

The new A-76 continues to encourage contractors to undercut agencies on pay and benefits in order to generate savings from privatization that come at the expense of those who perform the federal government's work. That contractors provide inferior pay and benefits, particularly for lower-level work, has been conclusively established by the Economic Policy Institute (THE FORGOTTEN WORKFORCE: More Than One in 10 Federal Contract Workers Earn Less Than a Living Wage, 2000).

OMB should have striven to exclude pay and benefits from the cost comparison process, so that competitions can focus on staffing levels and methods of delivering services, and thus avoid giving contractors incentives to undercut the pay and benefits of those who perform the federal government's work.

Agency managers anguish openly about the impact of OMB's privatization effort on women and minorities in the federal workforce. DVA managers have publicly expressed concern about the impact of the OMB privatization quotas on the hard-won diversity of the agency's workforce. DVA, in its A-76 comments, reports that "(A)ny significant effort to outsource jobs will have huge diversity

implications." Moreover, the Department of Transportation, in its comments on OMB's A-76 rewrite, reported the disproportionate impact of the privatization quotas' direct conversions on women and minorities. A consultant who has run federal public-private competitions for more than 20 years told *Government Executive* that, "(I)n looking at the affected workforce, it is disproportionately minority and female." In April, the Director of the National Park Service wrote to her superior that the impact of the OMB privatization quotas on diversity "concern(ed)" her.

4. ENCOURAGES THE USE OF A SUBJECTIVE AND EXPENSIVE "BEST VALUE" PUBLIC-PRIVATE COMPETITION PROCESS THAT IS AS UNNECESSARY AND UNPRECEDENTED AS IT IS VULNERABLE TO ABUSE

A-76 used to be an ultimately cost-based process. In the end, A-76 competitions were won on the basis of the lower cost to the taxpayers. Does that mean the old process didn't take into account issues of quality so that agencies secured the "best value?" No. Under the old A-76, agencies were free to specify the quality of services they wanted in the solicitations. After determining that an offeror could provide the service in question at the necessary level of quality, the competition proceeded on the basis of cost: which offeror could provide what the agency needed at the lower cost to taxpayers.

Contractors are unable to win as often as they'd like with public-private competitions that are ultimately cost-based. So they insisted that OMB switch to a subjective process called "best value" that would allow them to submit bids that are less responsive to the terms of the solicitation and more expensive than bids submitted by federal employees—and still win. In fact, "best value" is nothing more than a subtle industrial policy whereby the Bush Administration provides a particularly demanding business constituency, contractors generally but information technology contractors in particular, with subsidies that could never be justified through a fair, objective, and ultimately cost-based process.

Boosters of "best value," whether in the Congress, in the GAO, in the Administration, or in the contractor community, despite their immense combined propaganda resources, have consistently been unable to show how an ultimately cost-based competition process prevents agencies from making needed improvements in the quality of services. Insisting that "innovative" contractors are afraid to participate in an ultimately cost-based process is not a substitute for rational argument.

The revised circular, on page B-14, would encourage agencies to use a "best value" process for the first time ever in public-private competitions. OMB pressed the Congress this year to allow "best value" competitions to be used in DoD. However, the House Armed Services Committee said "No!" and the Senate Armed Services Committee would allow only a limited, four-year pilot

project for information technology services. Why did "best value" receive such a cool reception from defense authorizers, both Republicans and Democrats, in both chambers?

a. "Best value" takes longer than competitions that are ultimately cost-based, according to the results of "best value" competitions between contractors.

b. "Best value" costs taxpayers more than if the same work had been competed under an ultimately cost-based process, according to the results of "best value" competitions between contractors.

c. "Best value" is not necessary because the current process already allows contracting officers to explicitly take into account quality.

d. "Best value" allows contracting officers an extraordinary amount of discretion. Contractors note that "best value" has been used in competitions between contractors. However, its use has been controversial and extensively litigated because some contractors think "best value" is being used to favor their competitors. While it is difficult to systematically discriminate against one group of contractors in favor of another group of contractors, "best value" could be used systematically to discriminate against federal employees in favor of contractors, especially when wielded by an openly pro-contractor Administration that is rushing to review for privatization at least 425,000 federal employee jobs.

e. The "best value" process in the A-76 rewrite has few checks to prevent the process from being used to discriminate. Federal employees would not have the same legal standing as contractors to ensure that their concerns can be reviewed by the courts or GAO. Even if they did, most decisions, however subjective, cannot be appealed.

Unfortunately, non-DoD agencies don't benefit from the same safeguard that protects DoD. To her credit, Administrator Styles has attempted to make the irredeemably arbitrary "best value" process somewhat less arbitrary. GAO, perhaps the biggest booster of "best value," criticized OMB in its comments on the November draft for not fulfilling GAO's expectations for a new "best value" process, but never found the time to ask Ms. Styles to make the process less arbitrary. I note also, Mr. Chairman, that you commended Ms. Styles in a letter to the editor of *Federal Times* before the November draft had been published for, among other things, introducing into A-76 a new "best value" process. Perhaps you asked that Ms. Styles make that "best value" process less vulnerable to bias against federal employees in a separate and private communication with her.

While some additional guidance that was included by Ms. Styles in the new circular to make "best value" less arbitrary is clear and forthright (e.g., "All evaluation factors shall be clearly identified in the solicitation." and "For tradeoff source selection, the solicitation shall identify the specific weight given the evaluation factors and sub-factors, including cost or price."), other additional guidance is loose and unenforceable (e.g., "To the extent practicable, evaluation factors shall be limited to commonly used factors..." and "The quality of competition will be enhanced by using, to the extent practicable, evaluation factors and subfactors susceptible to objective measurement and evaluation.") To the extent there is no express requirement, an agency's policies and judgments are generally not subject to protest procedures. Moreover, even if we had standing, which we don't, most of these decisions are beyond judicial review. GAO, for example, requires credible evidence of bias and that the bias translated into action that unfairly affected the protester's competitive position. Ultimately, there is no protection against bias against federal employees, deliberate or accidental, because it is usually impossible to meet the burden or proof.

It is outrageous that the "best value" process can be used any time an agency notifies OMB of its intention. The Congress is right to limit the use of "best value" to no more than a pilot project for DoD. Non-DoD agencies, particularly the taxpayers who support them and the customers who depend upon them, deserve no less protection from this unnecessary, unprecedented, and dangerous process. Contractors often assert that a "best value" public-private competition process should not be viewed as novel because "best value" is used regularly in private-private competitions. However, given the efforts made by Ms. Styles to render the A-76 "best value" process less arbitrary as well as the absence of standing for federal sector offerors, there is no precedent for this new "best value" process, making it incumbent upon the Congress to restrict its use to a pilot project for all agencies.

5. ABSOLUTE COMPETITION REQUIREMENTS FOR FEDERAL EMPLOYEES FOR NEW WORK AND RENEWALS OF EXISTING WORK, BUT NOT FOR CONTRACTORS

The revised circular, on page 2, would require federal employees to compete in order to acquire new work or retain existing work: "Before government personnel may perform a new requirement, an expansion to an existing commercial activity, or an activity performed by the private sector, a streamlined or standard competition shall be used to determine whether government personnel should perform the commercial activity." However, contractors would not be held to those requirements. "A streamlined or standard competition is not required for private sector performance of a new requirement, private sector performance of a segregable expansion to an existing commercial activity performed by government personnel, or continued private sector performance of a commercial activity."

Instead, contractors would be held to the FAR. The FAR, however, as it is written and as it is applied, would not hold contractors to the same requirements as those imposed on federal employees.

That contracting officers use loopholes in the FAR to avoid subjecting contractors to competition is an established fact. According to the DoD Inspector General (D-2000-100), in the last comprehensive survey, "(I)nadequate competition occurred for 63 of the 105 contract actions (reviewed)...The abuse of the FAR requirement to give contractors a fair opportunity to be considered was worse than (had been reported previously)."

Judge Stephen M. Daniels, Chairman of the General Services Board of Contract Appeals, has declared that, "Although some parts of the (1984 Competition in Contracting Act) remain on the statute books, the guts have been ripped out of it. Openness, fairness, economy, and accountability have been replaced as guiding principles by speed and ease of contracting. Where the interests of the taxpayers were once supreme, now the convenience of agency program managers is most important. Full and open competition has become a slogan, not a standard; agencies have to implement it only 'in a manner that is consistent with the need to efficiently fulfill the Government's requirements.' It is now much easier to acquire goods and services without competition.

Ms. Styles herself has said that "Since the beginning of the (acquisition) reform movement, over a decade ago, I have not seen a serious examination of the effects of reform on competition, fairness, integrity, or transparency. As a result, I think we are seeing some serious competitive problems surface with the proliferation of government-wide contracting vehicles and service contracting."

6. COMPLETE ACCOUNTABILITY WHEN CIVILIAN EMPLOYEES FAIL, BUT NOT FOR CONTRACTORS

When civilian employees fail to perform, the new A-76 requires, on page B-20, that their work be recompeted. "Upon terminating an MEO letter of obligation, an agency shall change the inventory coding to reflect that the activity is no longer performed by an MEO and shall perform either a streamlined or standard competition." The fate of a defaulting contractor, one to whom a notice of termination has been issued, consistent with FAR Part 49, is not stated. However, FAR 49.402-4 (Procedure in lieu of termination for default) allows the contractor to continue performance under a revised delivery schedule or by means of a subcontract or other business arrangements. Moreover, the defaulting contractor can also litigate before the GAO and the Court of Federal Claims, another option not available to federal employees.

7. ONLY CONTRACTORS WOULD HAVE FULL LEGAL STANDING

Contractors—but not civilian employees directly affected by privatization or their union representatives—can participate in all appellate processes, including the GAO and the Court of Federal Claims. Directly affected civilian employees would be able to participate only in a purely internal appellate process, which rarely produces rulings in favor of protesters. And, per page B-20, federal employees wouldn't even have access to the internal appellate process for all streamlined competitions: "No party may contest any aspect of a streamlined competition."

While federal service contracting is riddled with inequities against its dedicated in-house workforce, it boggles the mind that federal employees and their union representatives are unable to hold agency officials responsible for their decisions in the same fashion as contractors. Asserting that our interests can be represented by a management official, particularly in the virulently anti-federal employee Bush Administration, is preposterous. Perhaps the legal interests of contractors should be represented by the Project on Government Oversight?

We might have been close to correcting this inequity if the House Government Reform Committee had accepted an amendment offered last month by Representative Dennis Kucinich (D-OH) to the Services Acquisition Reform Act to provide federal employees with the same legal standing as their contractor counterparts.

The only argument offered against this clearly meritorious amendment was the fear that federal employees could tie up the courts for years. This nightmare scenario bears no relation to reality. Virtually all federal employee litigation would be bid protests to the GAO, which operate under strict schedules. In addition, the federal government can override a stay under the Competition in Contracting Act at any time by finding an "urgent" need. In court, the federal government can only be stopped from awarding contracts, during a protest, by entry of an injunction. However, those injunctions can be overcome if the federal government argues to the court that it needs expedition.

The procedural arguments put forth by contractors and their friends in the Congress are blather intended to distract the rest of us from the obvious and indefensible inequity of allowing contractors, but not federal employees and their union representatives, to hold agencies accountable for their contracting decisions.

8. MAKE IT EVEN EASIER TO PRIVATIZE WORK CURRENTLY CATEGORIZED AS INHERENTLY GOVERNMENTAL

The revised circular, on page A-2, would include an implicit bias against the categorization of a function as inherently governmental. The new A-76 would require an agency to justify that a particular function was inherently

governmental, although no such requirement is imposed if an agency were to designate a function as commercial.

The new A-76 would also change the threshold set in statute for categorizing a function as inherently governmental by changing the definition established in law. Per the Federal Activities Inventory Reform Act (P.L. 105-270), "The term ("inherently governmental") includes activities that require either the exercise of discretion in applying Federal Government authority..." On page A-2, OMB has taken that definition and inserted the word "substantial" before the word "discretion" in order to weaken the definition of "inherently governmental."

The new A-76, on page A-4, would also allow contractors to challenge for the first time agencies' determinations of functions that are commercial but are too important or sensitive to be turned over to contractors (Reason Code A).

The weakening of the distinction between inherently governmental and commercial is particularly disturbing when it is recalled that, for example, DoD officials have expressed fear that inherently governmental work has already been privatized. "(A) reassessment (of our manpower structure) may very well show we have already contracted out capabilities to the private sector, that are essential to our mission..." wrote E.C. "Pete" Aldridge, undersecretary of Defense for Acquisition, Technology and Logistics, in a letter to OMB on December 26, 2002. Significantly, OMB has failed to require that agencies develop inventories of work performed by contractors in order to identify inherently governmental work that has been wrongly given to contractors because of the Administration's wholesale privatization effort.

9. EMPHASIZE PRIVATIZATION ONLY

In concert with the privatization quotas, the revised circular would continue to emphasize privatization reviews to the exclusion of all other methods for improving operations, often grouped under the rubric "strategic sourcing," including reorganizations, consolidations, business process reengineering, and labor-management partnerships. Considering that privatization reviews can cost as much as $8,000 per employee, according to the March issue of *Government Executive*, managers should be able to use those other methods as well.

In the new A-76, it is written, on page 2, "Agencies are encouraged to use a deviation procedure to explore innovative alternatives to standard or streamlined competitions, including public-private partnerships, and high performing organizations." However, those options are not discussed in any detail or encouraged in any meaningful way, even though the CAP's pro-contractor majority explicitly endorsed the implementation of high-performing organizations. Moreover, Administrator Styles, who is responsible both for revising A-76 as well as imposing the privatization quotas, has said that agencies would receive no credit for any of those efforts towards the privatization quotas. "None of that

("various alternatives to competitive sourcing, such as strategic sourcing") is going to go towards our goals," Ms. Styles told *Federal Times* on March 17.

10. DOD EMPLOYEES WOULD NOT ACTUALLY BE GUARANTEED OPPORTUNITIES TO FINALLY COMPETE FOR NEW WORK AND WORK PERFORMED BY CONTRACTORS

The revised circular rhetorically supports the notion that civilian employees should be allowed to compete for new work and contractor work. In fact, Ms. Styles told the Senate Armed Services Subcommittee on Readiness and Management Support earlier this year that "I have made changes to eliminate all barriers to bringing work back in-house, to holding a competition for bringing work back in-house."

Nevertheless, OMB's approach towards public-private competition is still almost entirely one-sided. In OMB's "Proud to Be!" goals for the implementation of the President's Management Agenda, goals are established for conducting arbitrary numbers of competitions in arbitrary periods of time. However, no goals are imposed for specifically ensuring that federal employees are finally allowed to compete for new work and contractor work, despite the fact that, according to OMB, contractors acquire and retain almost all of their work without ever having to compete against federal employees. Moreover, according to studies by GAO and the DoD Inspector General, contractors frequently don't even have to compete against one another.

Only a single agency, the Department of Housing and Urban Development (HUD), is reviewing work performed by contractors for possible insourcing: "There are some things that (HUD managers) are going to look at in terms of bringing it back in-house," Ms. Styles told *Government Executive* in March. That HUD is such an isolated example is hardly surprising, given the Administration's bias towards contractors. DoD officials, for example, have made it clear that no competitions for new work or contractor work would ever be conducted because the civilian workforce would not be allowed to grow. In fact, Ray Dubois, the Deputy Defense Undersecretary, in an article in the March 4, 2002, edition of *Federal Times*, said that "When public employees retire, they're (going to be) replaced with private sector employees..."

11. CONTINUING TO GIVE SHORT-SHRIFT TO TRACKING THE COST AND QUALITY OF WORK PERFORMED BY CONTRACTORS

Despite the Administration's contention that the OMB privatization quotas and the A-76 rewrite are all about saving money for taxpayers, tracking the costs of work given to contractors is given the usual short shrift. In fact, on page B-19, it turns out that it's business as usual. Contracting officers are required to implement a "quality assurance surveillance plan" as well as "maintain the currency of the

contract file" and "report performance information, consistent with the Federal Acquisition Regulation," which they are required to do already.

Moreover, in OMB's "Proud to Be!" scheme to implement the President's Management Agenda, goals are established for conducting arbitrary numbers of competitions in arbitrary periods of time. However, no goals are imposed for the establishment of reliable and comprehensive systems for ensuring taxpayer dollars entrusted to contractors are well spent. The emphasis is on turning the work over to contractors, not in making sure the work is done right. More significantly, agencies receive no additional resources to better administer contracts at the same time OMB is imposing its onerous privatization quotas.

Allowing the executive branch to establish its own underfunded and underresourced process for tracking the cost and quality of work performed by contractors has repeatedly failed. The Department of Defense uses the Commercial Activities Management Information System (CAMIS) to track the cost of performance of commercial activities. CAMIS is nothing new; and its execution has been consistently found wanting.

According to GAO-01-20, "As early as 1990, (GAO) stated that CAMIS contained inaccurate and incomplete data. In a 1996 report, the Center for Naval Analyses also found that the data in CAMIS were incomplete and inconsistent among the services and recommended that the data collection process be more tightly controlled so that data would be consistently recorded. As recently as August 2000, we continued to find that CAMIS did not always record information on completed competitions or reported incomplete or incorrect information. The exclusion of 53 studies because of incomplete data illustrates this point. While DOD officials initiated steps this year to improve the accuracy and completeness of data included in CAMIS...(t)o what extent that may have resolved shortcomings associated with CAMIS data is uncertain."

This problem could have been rectified had the House Government Reform Committee accepted an amendment offered last month by Representative Kucinich to the Services Acquisition Reform Act to require agencies to establish reliable and comprehensive systems to track the cost and quality of work performed by contractors. However, like the other amendments to make the federal service contracting process more accountable to taxpayers and more fair to federal employees, it was also voted down.

An opponent of this meritorious amendment implied, mistakenly, that the information that would have been generated by the Kucinich Amendment could be collected from the Federal Procurement Data System. To their credit, OMB officials, who tried at least three different approaches to tracking contractor costs in rewriting A-76, never endorsed that idea. An opponent of the Kucinich Amendment also said that he was uncomfortable with agency officials judging the quality of work performed by contractors. That criticism surprises me,

considering that that lawmaker also supports a "best value" competition process, one which would allow agencies to use subjective criteria in awarding contracts. How can an agency award contracts on the basis of "quality" without also being able to ascertain whether the contractor has provided the promised level of "quality?"

12. HOUSE PROVISIONS BEING CONSIDERED IN DEFENSE AUTHORIZATION CONFERENCE COULD MAKE NEW A-76 EVEN MORE UNFAIR FOR FEDERAL EMPLOYEES BY ALLOWING CONTRACTORS

a. TO ACQUIRE CONTRACTS-FOR-LIFE, WHILE FEDERAL EMPLOYEES WILL BE HELD TO STRICT TERM LIMITS, AND

b. TO WIN CONTRACTS ON THE BASIS OF THE TIME THEY USED, WHILE FEDERAL EMPLOYEES WOULD COMPETE ON THE BASIS OF WHAT THEY ACTUALLY DID

Section 1431 of the House defense authorization bill would allow contracting officers to repeatedly invoke options to extend contracts beyond their original duration. Indeed, the provision includes no numerical limitations on the number of options or the duration of those options ("extend the contract by one or more periods...").

Supporters will no doubt point to this language in the provision: "...and shall only be exercised in accordance with applicable provisions of law or regulation that set forth restrictions on the duration of the contract containing the option..." However, there is no strict five-year limitation in the FAR for the duration of contracts. In fact, FAR 17.204 leaves agencies with extraordinary loopholes to extend contracts well past five years: "*Unless otherwise approved in accordance with agency procedures*, the total of the basic and option periods shall not exceed 5 years in the case of services... *These limitations do not apply to information technology contracts.*" And, of course, a five-year limitation on duration is not the same as a five-year recompetition requirement.

In contrast, winning MEO's will usually be forced to recompete every five years. On page B-9, the competitive sourcing official "shall obtain prior written approval from OMB to use performance periods that exceed five years (excluding the phase-in period)." On page B-19, the winning MEO's must undergo a recompetition "before the end of the last performance period unless the Competitive Sourcing Official," identified as "an assistant secretary or equivalent official with responsibility for implementing this circular," (without delegation) "extend(s) the performance period for a high performing organization, and, on those occasions, for no more than three years."

However, "(f)or private sector performance decisions (on page B-20), the contracting officer shall comply with the FAR for follow-on competition." The historic use of loopholes within the FAR to avoid requiring contractors to undergo recompetition is extensively documented.

Section 1431, by allowing contracts to be extended without limitation, consistent with the provision of law or regulation, would allow contractors to avoid being subject to competition, while winning MEO's will, under the new A-76, be forced to recompete every five years, and no later than eight years.

Interestingly, Ms. Styles defended Section 1431, which has been accurately referred to by procurement experts and some Members of Congress as the "contractor-for-life" provision, by asserting at a House Government Reform Committee hearing earlier this year that she believed it "codifies existing flexibilities." Whether Section 1431 changes the law or reaffirms existing practice, it is wrong to hold federal employees to much more limited performance periods than contractors.

Section 1442 of the House defense authorization bill would encourage the use of time and materials as well as labor-hour contracts. These controversial contracting vehicles, which are similar to cost-reimbursement contracts in that they put the risk entirely on agencies, allow contractors to charge taxpayers for their time, i.e., how long contractors work, rather than their results, i.e., what contractors actually accomplish.

In contrast, MEO's are performance-based and thus unable to submit bids that are open-ended on results. Repeatedly, OMB officials have insisted that one of the most significant changes to be wrought by the new A-76 is the increased accountability of the winning MEO's. In other words, at the same time federal employees would be held strictly accountable for their results under the new A-76, contractors would increasingly be held accountable only for their time.

III. THE EXTENT TO WHICH THE PRINCIPLES ENDORSED BY THE CAP ARE REFLECTED IN THE NEW OMB CIRCULAR A-76

Again, it would be foolhardy to limit the discussion to the mechanics of the new circular. How the new circular will be used to achieve the privatization quotas is as important as how the new circular works. Consequently, it is necessary to consider both the new OMB Circular A-76 and the old OMB privatization quotas in tandem.

1. Support agency missions, goals, and objectives.

The circular was revised in order to expedite the privatization quotas. In tandem, the new circular and the old quotas subordinate "agency missions, goals, and objectives" to OMB's political objective of stroking an important constituency of

the Bush Administration. In OMB's view, agencies exist not to provide services, but to privatize services, jobs, and the public interest. Agencies don't decide how much they should privatize—OMB does. Agencies don't decide which services are inherently governmental—OMB does. Agencies' front-line managers don't decide which services are privatized and how that happens—agencies' privatization czars, a.k.a., the Competitive Sourcing Officials do.

Even the nuts and bolts of the rewritten circular demonstrate how privatization is relentlessly pursued at the expense of agencies' missions. If an agency doesn't receive any worthwhile contractor offers, then the agency should invite contractors to rewrite the solicitation. If an agency's contract administration apparatus is already stretched to the breaking point, too bad; many more competitions must be undertaken, and they've got to be run faster than ever before.

Efforts to free agencies from the OMB privatization quotas failed earlier this year during the Senate's consideration of the FY03 Omnibus Appropriations Bill and during last month's consideration of the Services Acquisition Reform Act when lawmakers partial to OMB's pro-privatization agenda offered hostile second-degree amendments to measures that would have prohibited the use of numerical privatization quotas.

GAO, which inspired these hostile second-degree amendments when it wrongly referred to prohibitions on the use of numerical privatization quotas as "blanket prohibitions" against the establishment of any privatization goals, as well as the lawmakers GAO inspired, insisted that numerical privatization goals were appropriate if based on research and analysis. The FY03 Omnibus Appropriations Bill included a requirement that OMB provide within 30 days of enactment a report that detailed the research and analysis used to justify the FY03 privatization quotas. According to staff on the House Appropriations Committee, no such report has ever been filed.

2. *Be consistent with human capital practices designed to attract, motivate, retain, and reward a high-performing federal workforce.*

The commentary to this principle insists that agencies should consider the impact of outsourcing on recruitment and retention and that the federal workforce should be treated as "valuable assets." Can anyone, no matter how pro-privatization, seriously contend that the privatization quotas and the rewritten circular show any evidence whatsoever that the experienced and reliable women and men who make up the civil service are even remotely regarded as "valuable assets?"

It is surely self-evident that enlightened human capital practices are fundamentally in conflict with the widespread practice encouraged by A-76 and the privatization quotas of privatizing work performed by federal employees in order to lower wages, reduce benefits, and avoid unions.

It must be noted that the rewritten circular actually exacerbates the perverse incentive to privatize work in order to reduce the pay and benefits of those who perform work for the federal government by imposing redundant and irrelevant overhead personnel costs on in-house proposals.

3. *Recognize that inherently governmental and certain other functions should be performed by federal workers.*

The rewritten circular actually narrows the definition of "inherently governmental" so as to force agencies to contract out work that has always been considered too important or too sensitive to entrust to contractors; and behind-the-scenes, OMB is pressuring agencies to list jobs as commercial that agencies actually consider "inherently governmental." Moreover, the failure to establish a contractor inventory means that agencies will be unable to systematically determine just how much inherently governmental work has already been privatized.

In the panel's commentary for this principle, it was said that "(c)ertain other capabilities...or other competencies such as those directly linked to national security, also must be retained in-house to help ensure effective mission execution." Although far too narrowly stated, this is an excellent point. That is, commercial functions can be contracted out to such an excessive extent that it undermines the government's ability to perform its work. However, if agencies aren't systematically tracking contractors' work, how do they know when too much commercial work has been contracted out?

4. *Create incentives and processes to foster high-performing, efficient and effective organizations throughout the federal government.*

As noted earlier, the rewritten circular and the privatization quotas emphasize privatization to the exclusion of all other methods for improving the delivery of services, including, "public-private partnerships and enhanced worker-management cooperation," which were mentioned in the text to this principle. Moreover, High Performing Organizations, a pet project of the CAP Chairman, which would function both as an alternative and a complement to public-private competition, are very conspicuous by their near invisibility in the new circular, notwithstanding that all Administration panelists, including the OMB representative, voted in favor of their establishment.

5. *Be based on a clear, transparent, and consistently applied process.*

Can a circular that can't bring itself to unambiguously condemn the use of subjective evaluation factors be considered "clear, transparent, and consistently applied?"

Can a process that allows a contractor to win when the in-house proposal is less expensive and more responsive be considered "clear, transparent, and consistently applied?"

Can a process that allows a contracting officer to give special credit to a contractor for a feature not included in the solicitation but not then give federal employees an opportunity to reformulate their proposal to include that new feature be considered "clear, transparent, and consistently applied?"

Can a process that charges in-house proposals twice for indirect labor costs—and contractors not even once—be considered "consistently applied?"

Can a process that requires federal employees to compete in order to acquire and retain work—but not contractors—be considered "consistently applied?"

Can a process, which when combined with the OMB privatization quotas, require that hundreds of thousands of federal employee jobs—but just a tiny handful of contractor jobs—undergo competitions be considered "consistently applied?"

6. *Avoid arbitrary full-time equivalent or other arbitrary numerical goals.*

The rewritten circular and the OMB privatization quotas are based on two numerical goals, one number that is either 50 or higher and another number that is extremely close to 0. Agencies are required to review for privatization at least 50% of their in-house commercial workforces. Agencies are required to allow federal employees to compete for 0% of new work. And agencies are required to review for insourcing slightly more than 0% of contractor jobs.

7. *Establish a process that, for activities that may be performed by either the public or the private sector, would permit public and private sources to participate in competitions for work currently performed in-house, work currently contracted to the private sector, and new work, consistent with these guiding principles.*

As noted before, the rewritten circular must be placed in its political context, specifically the OMB privatization quotas. Although Administrator Styles claims to have removed all obstacles that were in the old circular to federal employees competing for new work and contractor work, the quotas work in one-sided fashion. Clearly, opportunities for federal employees to compete for new work and contractor work exist only on paper.

Ms. Styles and her contractor allies are wont to say that contractors are already subject to competition. However, federal government work currently performed by contractors was acquired almost exclusively without any public-private competition; and that work, according to GAO and the DoD Inspector General, was all-too-frequently acquired without any private-private competition. And, of

course, there is even less reason to prevent federal employees from competing for new work since it has, by necessity, never been subject to any competition. Given how proud Ms. Styles and her contractor allies are of the new circular's expedited competition process, lawmakers opposed to the TRAC Act and TRAC-like amendments can never again fall back on arguments about the process being too bureaucratic and too cumbersome to allow for subjecting contractors to public-private competitions for new work and the work they are currently performing.

8. *Ensure that when competitions are held, they are conducted as fairly, effectively, and efficiently as possible.*

The CAP principles were sometimes repetitive, so I must refer readers to my discussion of the other principles, for the most part.

As discussed above, the "streamlined" process, which is so strongly emphasized in the new circular, is contrary to the CAP report, both in regard to this principle and the recommendation, with respect to its deletion of the minimum cost differential, its failure to make mandatory the Most Efficient Organization process, and its inclusion of a wholly arbitrary 90-day deadline.

Moreover, in the minds of those who wrote the new circular, the only conflicts of interest worth addressing are those that might conceivably benefit federal employees in the privatization process; the longstanding conflicts of interest which demonstrably benefit contractors will be permitted to continue to undermine the integrity of the privatization process.

The privatization process is rife with conflicts of interest that benefit contractors. FAR Subpart 9.5 purports to minimize contractor conflicts of interest. However, it is largely full of empty exhortations. Conflicts of interest arise when contractors recommend or otherwise advise buying agencies to make additional purchases from the contractors with whom the recommending contractors have business interests. While the FAR tries to address blatant conflicts (e.g., contractors recommending themselves for jobs), the nature of modern day government contracting is replete with contractor "partnerships," "strategic relationships," and other arrangements in which various contractors agree to help one another out—usually through various subcontracting relationships. The rewrite of the circular raises the very real prospect that contractors will be increasingly responsible for evaluating the work of other contractors—contractors with whom they have business interests at many levels. The inevitable conflicts of interest and the resulting corruption have the potential to make recent accounting and auditing scandals pale in comparison.

9. *Ensure that competitions involve a process that considers both quality and cost factors.*

The CAP's pro-taxpayer minority, noting the inability of the panel's pro-contractor majority to show why a "best value" process was needed, saw this principle as a recitation of the obvious, understanding that any ultimately cost-based process allows for quality to be explicitly taken into account so that agencies can have the best of both worlds: the services they need, but at the lowest possible prices.

However, even assuming for the sake of argument that the principle endorses "best value," it can be said that the OMB rewrite includes a "best value" process that increases the role of politics, bias, and corruption in the selection process and undermines taxpayer interests by encouraging agencies to buy what they want, rather than what they need.

10. Provide for accountability in connection with all sourcing decisions.

Work performed by federal employees is meticulously monitored through the FAIR Act, the budget process, and the appropriations process. On the other hand, agencies don't even know what work contractors are doing—let alone how well they are performing. Is that accountable? Other than to insist that contracting officers do what they are already required to do to monitor contractor performance, the new A-76 does next to nothing to establish reliable and comprehensive systems to track the cost and quality of work performed by contractors.

Rank-and-file federal employees and their unions have no meaningful appellate rights. In fact, we even lose our ability to contest decisions made pursuant to the aggressively-emphasized "streamlined" competitions. Meanwhile, contractors can appeal decisions to the GAO and the Court of Federal Claims. Is that accountable?

Because of the intrinsic subjectivity of the "best value" process, most agency decisions are beyond any judicial review, even if rank-and-file federal employees and their unions possessed standing. How accountable is that?

When an MEO falls into default, the work is recompeted. However, when a contractor defaults, it could be business as usual. How accountable is that?

Under existing law and regulation, federal employees—but not contractors—should continue to be subject to a myriad of requirements and obligations. As the independent scholar Dan Guttman has written, federal employees, but not contractors, are subject to a variety of rules "that address conflict of interest (e.g., 18 U.S.C. 208), assure that government activities are (with limits) `open' to the public (e.g., Freedom of Information Act), limit the pay for official service, and limit the participation of officials in political activities." Despite the Bush

Administration's extraordinary effort to massively increase the number of politically well-connected contractors on the federal payroll and so completely blur the appropriate and vital distinction between public and private, OMB will make no effort to ensure that contractors are as accountable to the American people as federal employees already are. How accountable is that?

IV. CONCLUSION

Federal employees have heard a lot of excuses about why federal service contracting cannot be made more accountable to taxpayers and more fair to federal employees. During the last two and one-half years, we were told to wait, first, until a pro-contractor panel had produced a pro-contractor report and then until a pro-contractor Administration had produced an even more pro-contractor OMB Circular A-76. And all during that time, OMB imposed its privatization quotas and contractors worked with their Congressional allies to pass legislation to make the process even more pro-contractor.

We have even been told to wait for civil service "reform." But, of course, when Administration officials got all the civil service reform they wanted in the legislation passed last year by the House to establish the Department of Homeland Security and the legislation passed this year to impose the Rumsfeld Plan, there were no accompanying provisions to reform service contracting in those agencies.

Concern over the effort by Administration officials and likeminded lawmakers to sell off the federal government to their contractor cronies grows every day and does so on a bipartisan basis. Whether the House Government Reform Committee will be part of the process to reform federal service contracting to make it more accountable to taxpayers and more fair to federal employees remains to be seen.

Thank you for this opportunity, Mr. Chairman, to testify this morning before the House Government Reform Committee. I look forward to answering any questions from you and your colleagues.

Mrs. JO ANN DAVIS OF VIRGINIA. Ms. Kelley.

Ms. KELLEY. Thank you. Mrs. Davis and members of the committee, I want to thank all of you very much for giving me the opportunity to share NTEU's views on the OMB rewrite of A–76 on behalf of the 150,000 Federal employees represented by NTEU.

NTEU strongly opposes OMB's quota-driven campaign to privatize more than 850,000 Federal jobs. Committee members should not be misled by OMB rhetoric that the new A–76 will improve the use of public-private competitions. Under the A–76 revisions, more Federal jobs will be put up for grabs to the private sector.

Last week, NTEU filed a lawsuit charging that OMB has illegally overridden Congress on the sensitive issue of determining whether a function is inherently governmental. The A–76 revisions require Federal agencies to apply a substantially more restrictive definition of inherently governmental functions than is now contained in the FAIR Act. This change would have an adverse impact on large numbers of Federal employees. In fact, we have already heard from the IRS that their FAIR Act inventory of Federal jobs eligible for privatization will nearly double next year.

NTEU believes the A–76 revisions are unfair to Federal employees and will deprive taxpayers of the benefits of true public-private competition. For example, the revisions do not make one single meaningful change to improve oversight of contractors and better track their performance. The new A–76 continues to disregard the need for agencies to determine how much the contractors work cost the taxpayers, whether the contractors are delivering the services they promised within the timeframes promised, and whether the services are being delivered at an acceptable level of quality.

OMB and this committee are well aware of the case of Mellon Bank, a contractor hired by the IRS that lost, shredded or removed 70,000 taxpayer checks and tax returns worth $1.2 billion in revenue to the U.S. Treasury. Yet the new A–76 would not prevent a Mellon Bank type of contracting fraud from happening again.

I was pleased that the new Circular would eliminate the use of direct conversions. However, within days of the release of the revised Circular, we started hearing complaints from agencies about the new direct conversion rules; and now it is unclear what action, if any, OMB will take to stop agencies from either bypassing the new rules altogether or seeking waivers to continue with the direct conversions.

Another loophole for agencies to circumvent OMB's stated goal for competition is the so-called streamlined competition process. Streamlined studies under the rewrite are nothing more than sugar-coated direct conversions in which Federal jobs are transferred to contractors without first giving Federal employees an opportunity to put forward a competitive proposal. The new streamlined rules emphasize speed in privatizing Federal jobs at the expense of quality and costs. Because of the rigid 90-day timeframe under the streamlined study, agencies have absolutely no incentive to reorganize their own employees in a way that will deliver higher quality services to the taxpayers at a lower cost.

It is no coincidence that at the same time OMB was revising A–76 and enforcing its privatization quotas, the IRS was developing a proposal to privatize tax collection functions. This is even further

evidence of the aggressive push to privatize government activities with or without competition whether or not they are inherently governmental and whether or not they save money.

Even under the new A–76, tax collection is inherently governmental and would require legislation before it could be privatized. Under this latest scheme the IRS wants to privatize these activities without first conducting a public-private competition. According to the Joint Committee on Taxation, this privatization proposal would bring in less than $1 billion over 10 years at a cost of over $200 million. The IRS could bring in that amount in 1 year with just over $30 million in additional in-house enforcement resources. IRS employees can do the work for 15 percent of the cost of the contractors, but the administration still wants to contract it out.

It is hard to believe that the A–76 process is supposed to be about competition. But even if agencies actually do conduct a competition, the new A–76 tilts the playing field heavily in favor of contractors.

While OMB has gone to great pains to include every potential cost of Federal employee performance of the work, the new A–76 arbitrarily excludes legitimate costs of doing business with contractors. NTEU is also concerned that the new A–76 encourages agencies to move away from cost-based competitions to more subjective analysis that will lead to more outsourcing at a higher cost to the taxpayers. The new A–76 would allow contracting officers to award contracts to a bidder that comes in with a more expensive bid than other bidders. Introducing this tradeoff called best value into public-private competitions would make fair comparisons between bids even more difficult.

The new A–76 does nothing to advance the principles of increasing taxpayer value and leveling the playing field for Federal employees. I therefore urge this committee to block the implementation of the revised A–76 until these countless problems can be resolved. Thank you.

Mrs. JO ANN DAVIS OF VIRGINIA. Thank you, Ms. Kelley.

[The prepared statement of Ms. Kelley follows:]

National Treasury Employees Union

Testimony
Of
Colleen M. Kelley
National President
National Treasury Employees Union

"NTEU Views on Flawed A-76 Revisions"

June 26, 2003

Committee on Government Reform
2154 Rayburn House Office Building

Chairman Davis, Ranking Member Waxman, and other distinguished Members of this committee, my name is Colleen Kelley and I am the National President of the National Treasury Employees Union (NTEU). I was one of the twelve members of the Commercial Activities Panel (CAP). NTEU represents 150, 000 federal employees in 29 federal agencies and departments. I appreciate you giving me the opportunity to share the views of frontline federal employees on the Office of Management and Budget (OMB) rewrite of the A-76 outsourcing rules, and how the new A-76 will affect the Administration's privatization initiatives.

Let me be very clear: NTEU strongly opposes OMB's quota-driven campaign to privatize more than 850,000 federal employee jobs. OMB's rewrite of A-76 gives agencies even greater flexibility to turn the work of the federal government over to private contractors. I caution committee members not to be misled by OMB rhetoric that this new A-76 Circular will improve the use of public-private competitions. Instead, the new A-76 Circular is designed to give OMB one more tool to contract out as many federal employee jobs as quickly as possible. While the old A-76 Circular was not perfect, the revisions are unfair to federal employees, and will result in contractor services at higher costs and lower value to the taxpayers.

Opening Up Inherently Governmental Jobs to Contractors

Under the A-76 revisions, more federal jobs will be put up for grabs to the private sector, since OMB's sweeping changes expand the number of federal employee jobs eligible for privatization. Last week, NTEU filed a lawsuit in federal court alleging that OMB's revisions to A-76 are illegal. NTEU believes that OMB has illegally trumped Congress on the sensitive issue of determining whether a function is "so intimately related to the public interest as to require performance by federal government employees." In the lawsuit, we point out that the A-76 revisions require federal agencies to apply a substantially narrower definition of inherently governmental functions than is now contained in federal law. Under the Federal Activities Inventory Reform (FAIR) Act of 1998, activities that are inherently governmental may only be performed by federal employees, while those activities designated as "commercial" may be contracted to the private sector.

The FAIR Act requires the exercise of "discretion" for a function to be deemed inherently governmental. The revised Circular A-76, on the other hand, rules out as inherently governmental all functions that do not require the exercise of "substantial" discretion – a significant difference in language.

Moreover, functions involving the collection, control or disbursement of federal funds, which have been deemed inherently governmental under the FAIR Act and well before the FAIR Act, may obtain that designation under the new circular only if they include the authority "to establish policies and procedures."

These sweeping changes would have a substantial adverse impact on large numbers of federal employees, including thousands of NTEU-represented employees who are engaged in the collection, control or disbursement of appropriated or other federal funds, even though they may not be responsible for "establishing policies or procedures." For example, as a result of OMB's unilateral expansion of the definition of "commercial in nature," we have already heard from the

IRS that their FAIR Act inventory of federal jobs eligible for privatization will nearly double next year.

In conjunction with narrowing the inherently governmental definition, OMB also has restricted the rights of unions and other interested parties to challenge improper agency designations of functions as "commercial." The circular replaces the FAIR Act's broad right to pursue such "challenges" with a one-shot opportunity to file a challenge only if and when an agency changes the function's classification. This, too, runs afoul of the FAIR Act.

Ensuring that inherently governmental functions are performed by federal employees only is firmly rooted in sound government policies, such as ensuring that confidential taxpayer information is safeguarded and that the government maintains needed expertise at all times. I urge this committee to seek to uphold the long held definition of inherently governmental.

NTEU has several other concerns with the A-76 revisions. In response to OMB's initial proposed revisions to Circular A-76, NTEU submitted detailed comments describing how the new provisions were unfair to federal employees and would deprive taxpayers of the benefits of true public-private competition. Unfortunately, the final version of the Circular remains heavily slanted in favor of private contractors over federal employees, and will deprive taxpayers of the benefits of fair competition.

Lack of Accountability from Contractors

The revisions to A-76 will move even more federal jobs to the private sector, yet the revisions would not make one single meaningful change to improve oversight of contractors and better track their performance. Oversight is particularly important now, as the Administration requires that more and more government functions be opened to contractors. The revised Circular continues to fail in effectively holding contractors accountable for their costs and performance. The Circular endorses the status quo of asking agencies to monitor the work of contractors, without having given these agencies any additional resources to better track their work.

The revised Circular requires agencies to redouble their time and resources to produce inventories of the size and makeup of the entire federal workforce, including those performing both commercial and inherently governmental functions, yet it fails to require agencies to implement systems to track whether current contracting efforts are in the best interests of the taxpayers. The new A-76 continues to disregard the need for agencies to determine how much the contractors' work costs the taxpayers, how the actual costs of the contract compare to what the contractors originally promised, whether the contractors are delivering the services they promised to deliver within the timeframes they promised, and whether the services are being delivered at an acceptable level of quality. When a contractor is not living up to its end of the deal, the government must have the realistic capability to bring the work back in-house. The government owes this accountability to the taxpayers who fund it. Agencies and the taxpayers did not know this information before the revised A-76 was released, and they would still be in the dark now.

Once a contractor gets a contract, that work is out the door and rarely--if ever--scrutinized again. For example, Mellon Bank, a contractor hired by the IRS as part of its "lockbox program," lost, shredded, or removed 70,000 taxpayer checks worth $1.2 billion in revenues for the U.S. Treasury. In January of this year, GAO issued a report (GAO-03-299) criticizing the inadequate oversight of Mellon Bank. Among other things, GAO found that:

(1) "Oversight of lockbox banks was not fully effective for fiscal year 2002 to ensure that taxpayer data and receipts were adequately safeguarded and properly processed. The weaknesses in oversight resulted largely from key oversight functions not being performed" (p.3)

(2) "Tax receipts and data were unnecessarily exposed to an increased risk of theft." (p. 21)

(3) Contract "employees were given access to taxpayer data and receipts before bank management received results of their FBI fingerprint checks." (p.29)

Another example of poor agency management of contractors came to light recently when a contractor hired by the IRS and other federal agencies to provide bomb detection dogs and services to patrol the perimeters at several federal facilities, including the IRS Service Center in Fresno, was convicted after he lied about the qualifications of his dogs, then faked the dogs' certifications to keep his business with these federal agencies. Fortunately, the government was able to catch this contractor, but unfortunately it was well after the contractor already had put at risk the security of thousands of federal employees.

The new A-76 fails to make any genuine improvements in contractor oversight to prevent Mellon Bank or security dog contracting frauds from happening again. I wish I could say with a straight face that lessons have been learned from contracting debacles of the past and OMB has applied these lessons to the new A-76. Unfortunately, I cannot. The new A-76 is business as usual when it comes to lack of accountability from contractors. Taxpayers and federal employees deserve, at a minimum, the same level of transparency and accountability from contractors as there is of the federal workforce.

Privatization Without Competition

While I was very concerned that a number of the issues NTEU raised were not addressed in the revised A-76 Circular, I was pleased that the new Circular supposedly eliminates the use of direct conversions, a flawed privatization process in which federal employees are not given an opportunity to compete in defense of their jobs. The revised Circular mandates that even those direct conversions underway under the old Circular, but not publicly announced before May 29, 2003, must be converted to streamlined or standard competitions within 30 days.

However, within days of the release of the revised Circular, we started hearing complaints about the new direct conversion rules from agencies that were performing such conversions prior to May 29 under the old Circular. And now, it is unclear what action, if any, OMB will take with agencies that are either bypassing the new rules altogether or seeking waivers to continue with direct conversions. Like so much in the A-76 Circular, OMB has

managed to create numerous loopholes to ensure that more government jobs are moved to the private sector as quickly as possible and with as little competition as possible.

Another loophole for agencies to circumvent OMB's stated goals for competition is the so-called "streamlined competition" process. Streamlined studies are nothing more than sugar-coated direct conversions, in which federal jobs are transferred to contractors without first giving federal employees an opportunity to put forward a competitive proposal. Much like the direct conversion provisions in the old A-76, the new streamlined rules emphasize speed in privatizing federal jobs at the expense of quality and costs.

Agencies can use the streamlined process if a government function involves fewer than 65 federal employees. Because of the rigid timeframe of 90 days in which agencies must complete the streamlined study, agencies have absolutely no incentive to reorganize their own employees in a way that will deliver higher quality services to the taxpayers at a lower cost. The shortened process will make it harder, if not impossible, for an in-house proposal to maximize new efficiencies and innovations, thereby creating a strong bias in favor of the outside contractor. This streamlined proposal runs counter to the recommendation of the Commercial Activities Panel to encourage the establishment of high-performing organizations and continuous improvements throughout the federal government.

Furthermore, under a streamlined study, no longer are contractors required to come in at the lowest cost with their bids in order to win the competition: contracts can now be awarded to contractors if their bids are "cost effective," a much weaker selection criteria to meet. And whereas in the past, the costs incurred by the taxpayers as a result of converting federal work to contractors were factored into the private sector bids, these costs are no longer included under a streamlined study. Finally, what limited rights employees have to challenge faulty award decisions under standard A-76 competitions have been completely eliminated under the streamlined process.

Privatization of Tax Collection Activities

It is no coincidence that at the same time OMB was revising A-76 and enforcing its privatization quotas, the IRS was developing a proposal with private debt collectors to privatize tax collection functions. This is even further evidence of the Administration's aggressive push to privatize government activities with or without competition and whether or not they are inherently governmental.

Tax collection has always been off limits to private contractors, since it has historically been deemed an inherently governmental function. Even under the new A-76's watered down definition of inherently governmental, the Administration acknowledges that tax collection is inherently governmental, and would require legislation before it could be privatized. But the fact that the Administration is even seeking legislative authority to outsource tax collection proves that if for some reason A-76 does not allow an agency to privatize a certain function, this Administration will find a way to privatize it.

Under this latest scheme, the IRS is proposing to pay private collection agencies on a commission basis to collect tax debt. The IRS wants to privatize these activities without first conducting a public-private competition to determine what is best for the taxpayers.

The IRS tax collection privatization proposal will cost the taxpayers $3.25 billion, more than ten times as much as it would cost the IRS to use its own employees. In a report submitted to the IRS Oversight Board last September, titled "Assessment of the IRS and the Tax System," former Commissioner Charles Rossotti made clear that with more resources to increase IRS staffing, the IRS will be able to close the compliance gap. The report found that if Congress were to appropriate an additional $296 million to hire more IRS compliance employees to focus on Field and Phone Accounts Receivable, the IRS could collect an additional $9.47 billion in known tax debts per year. This would be a $31 return for every dollar spent. Compare that to the contractor 25% commission scheme in which the contractors will be paid $3.25 billion to collect $13 billion: a three dollar return for every dollar spent. According to the Joint Committee on Taxation, the Administration's tax collection privatization proposal would bring in less than $1 billion over ten years at a cost of over $200 million. The IRS could bring in that amount in one year with just over $30 million in additional in-house enforcement resources.

The proposal to privatize tax collection is opposed by the Citizens for Tax Justice, the Consumer Federation of America, the Consumers Union, the National Consumer Law Center, and the National Consumers League. And concerns about the IRS's ability to manage debt collection contractors and adequately protect the rights and privacy of the American taxpayers have been raised by the General Accounting Office, the Treasury Inspector General for Tax Administration, the National Taxpayer Advocate, the Tax Executives Institute, the National Association of Enrolled Agents, and the Tax Section of the American Bar Association.

Two pilot projects were authorized by Congress to test private collection of tax debt for 1996 and 1997. The 1996 pilot was so unsuccessful that the 1997 project was cancelled. Contractors violated the Fair Debt Collection Practices Act (FDCPA) and did not protect the security of sensitive taxpayer information and the IRS officials charged with oversight of the contracts were ill-informed of the law and lax in their duties, failing to cancel the contracts of those in violation even though they had the authority to do so.

In addition to using prohibited collection techniques and not safeguarding confidential taxpayer information, the contractors did not bring in anywhere near the dollars they projected, millions of dollars were spent by the IRS to train the contractors, and millions were not collected by IRS employees because they were training the contractors instead of doing their jobs. (See GAO/GGD-97-129R and IRS Private Debt Collection Pilot Project, Final Report, Oct. 1997)

So while we are here today debating the nuances of OMB's troubling revisions to the A-76 Circular, in practice, agencies are seeking to privatize thousands of federal employee jobs without using A-76. Billions of taxpayer dollars are flying out of the Treasury coffers to pay private contractors to perform government functions that were never – and if OMB has its way, will never be – first subjected to public-private competition. Based on what NTEU sees happening at federal agencies, it is obvious that OMB's real motive behind the A-76 revisions is

to move more federal jobs to the private sector, regardless of cost, quality, and reliability of services.

Congress should require OMB to go back to the drawing board and develop an A-76 process that requires public-private competition before any government work is privatized, instead of one that allows agencies to pick and choose when they want to use a competitive process.

A Process That Costs the Taxpayers

After seeing all of the loopholes in A-76 to privatize federal jobs without competition, it is hard to believe that the A-76 process is actually supposed to be about competition. But even if agencies actually do conduct a standard A-76 public-private competition, OMB's changes tilt the playing field heavily in favor of contractors. First of all, agencies are required to complete standard A-76 competitions within twelve months, even though the most efficiently run A-76 studies have routinely taken 18 months or more to complete. And while OMB has gone to great pains to include every potential cost of federal employee performance of the work, the new A-76 arbitrarily excludes from the private sector bid legitimate costs of doing business with non-governmental entities. As an example of a windfall to the contractors in the costing process, the cost that must be incurred for a performance bond, if required by the solicitation, would be excluded from the contractor's price when compared against the agency bid. This is an actual cost of doing business with contractors that would not be incurred if federal employees performed the service: yet once again the contractors enjoy the benefit of having this cost excluded.

A Costly Alternative

NTEU is also concerned that the new A-76 Circular encourages agencies to move away from cost-based competitions to more subjective analyses that will lead to more outsourcing at higher costs to the taxpayers. The revised Circular now allows agencies to use the so-called "Tradeoff Source Selection Process" for selecting a winner in a competition between federal employees and contractors. This proposal is harmful not just to federal workers, but to American taxpayers who will wind up paying more than is necessary to get the job done and who will have less accountability as to how their tax dollars are spent.

The revisions to the Circular would, for the first time, allow contracting officers to use subjective determinations in public-private competitions. This would allow contracting officers to award contracts to a bidder that comes in with a more expensive bid than other bidders, but promises to perform work not requested by the agency. Introducing this tradeoff concept into public-private competitions would make fair comparisons between bids even more difficult, as it undermines the agency's ability to conduct an "apples-to-apples" comparison, an important aspect of any procurement decision.

OMB claims that the tradeoff process would be implemented on a limited basis only. However, the revised Circular gives agencies wide latitude to use this process. If the Administration is adamant about using this risky process, then it should first limit its application, so that we can find out whether or not it works for the taxpayers. Not until this process has been

tested and proven effective should the study be approved for government-wide use by the agencies.

I welcomed the Administration's effort to revise the OMB Circular A-76 as an excellent opportunity to improve the delivery of services to the taxpayers through fair competition on a truly level playing field for those competing. To my dismay, the new A-76 does nothing to advance the principles of increasing taxpayer value and leveling the playing field. Not only would federal employees suffer as a result of the revisions, but the taxpayers would as well. I therefore urge this committee to work to block the implementation of the revised A-76 until the countless problems I mentioned are resolved.

Thank you for giving me the opportunity to testify today.

Mrs. JO ANN DAVIS OF VIRGINIA. Mr. Dilks.

Mr. DILKS. Thank you, Mrs. Davis and members of the committee.

My name is Donald Dilks. I am the CEO of DDD Co. My company has been providing a wide variety of logistical services to government and industry for over 23 years. We currently furnish many of the mail processing services to government agencies in Washington, DC, including the mail digitization services for the House of Representatives.

I also serve as chairman of the Contract Services Association of America, which represents over 400 contractors providing various services to the Federal Government.

Thank you for the opportunity to be here today and share my perspective on the revisions to Circular A–76 which were released last month by the Office of Management and Budget. In general, we believe the revisions represent an improvement in the competitive sourcing process and should increase private sector competitions for government services, which is good for the taxpayer.

CSA has worked with and on Circular A–76 since the Association's founding in 1965, when there was very little industry interest. Now, public-private competitions are a much-discussed issue and key to agency performance.

Some comments on the recommendations included in the revision: Much of the revisions are based on the recommendations made by the Blue Ribbon Commercial Activities Panel.

I believe the revisions will improve the process in the following areas: The FAIR Act inventories. The revisions spell out how agencies should develop their annual inventories and require them to include the inherently government activities as well. The revision also allows challenges to the applicability of the Reason Codes that have been used to protect functions from competitions. These changes will enhance agency accountability.

The timeframe. Shortening the time for competitions will facilitate the involvement of more competition, especially small businesses. It is more reflective of a FAR-based process. The evaluation process will be fairer by treating the public sector proposals like private sector bids and by evaluating all proposals, both public and private, under the same set of rules, a system based on Federal Acquisition Regulations that is most familiar to government procurement officials.

For the first time, many public sector employees will be allowed to make offers based on best value and therefore encourage innovation from those who are most familiar with the work, the government employees themselves.

Accountability. The revisions enhance the accountability associated with competitive sourcing. The FAR-type approach offers a procurement process that is more transparent than the old A–76 approach. Competition officials and individuals participating in the process must comply with procurement integrity, ethics and standards of conduct rules.

Most important, if the public sector wins the competition, its proposal will be treated like a contract. This means that the government officials will monitor the cost and service performance levels of the public sector's most efficient organization.

Some recommendations that were not included and some other concerns: The policy statement. We are concerned that the long-standing government policy statement related to reliance on the private sector for needed commercial services have been eliminated. We urge that this statement be included in the transmittal memo.

Elimination of the direct conversions. This direct conversion process increases agency flexibility to ensure it is receiving the best value to meet its mission needs and meet their small business goals.

We recognize the intent of the streamlined process and hope that agencies will indeed avail themselves of this process. We do applaud the elimination of the differential in the streamlined process.

Concerning the Inter-Service Support Agreements, the proposed November 2002, revisions included an important modification related to the Inter-Service Support Agreements. Unfortunately, this section was eliminated from the final revisions.

We are concerned that the Inter-Service Agreements among Federal agencies as well as the military services are used as a means to avoid outsourcing and privatization. We do not believe these should be exempt from the competition.

Some other issues: The proposed revisions are silent on protest rights. We believe that both parties, the agency and the company, bidding under the same set of rules, should have the appeal rights.

In terms of the Performance-Based Services Acquisition, the proposed revision stated that a Performance Work Statement that is developed in a standard competition shall be performance-based with measurable performance thresholds and may encourage innovations. This specific statement was not included in the revisions. We assume the contracting office will continue to encourage and move to greater use of performance-based contracts.

Finally, the small business considerations issues such as small business set-asides, minority business preference programs, HUBZones, Native American preferences, disabled-veteran and women-owned business preferences are not addressed.

In summary, it is too early to tell whether CSA members and other private sector firms will jump back into the A–76 competitions. It is important to recognize that shifting to a FAR-type process is not a cure for all the problems facing competitive sourcing.

Significant issues remain. Cost comparisons between public and private sector bids will continue to demand careful scrutiny and fairness. Improvement is also needed in developing quality statements of work, the heart of the solicitation. Also, all competitors need to be insured equal access to relevant information, including workload data, in order to make credible proposals. And there needs to be continued high-level agency support, along with an ongoing dialog between the agency and OMB.

While the new rules are easier to navigate and there appears to be a greater clarity and consistency as well as enhanced accountability, implementation remains key where, as we have so often seen happen in the past, good intentions will go down the drain. Fairly implementing this for public-private competitions will be a challenge filled with nuances and potential pitfalls, but we stand ready to aggressively work with Congress and the administration

to ensure the goals of the A–76 revisions are fully achieved. We believe it is the right thing to do.

Thank you.

Mrs. JO ANN DAVIS OF VIRGINIA. Thank you, Mr. Dilks.

[The prepared statement of Mr. Dilks follows:]

STATEMENT OF
Donald Dilks
President, DDD Company

BEFORE
House Government Reform Committee

HEARING ON
Final Revisions to OMB Circular A-76

June 26, 2003

Mr. Chairman and members of the Committee, my name is Don Dilks and I am President of DDD Company. My company provides a wide variety of logistical services to its Government and industry clients, specializing in mail processing and distribution warehousing, order fulfillment and messenger services.

I also serve as Chairman of the Executive Committee for the Contract Services Association of America (CSA), which is the premier industry representative for private sector companies that provide a wide array of services to Federal, state and local governments. Our members are involved in everything from maintenance contracts at military bases and within civilian agencies to high technology services, such as scientific research and engineering studies. Many of our members are small businesses, including 8(a) certified companies, small disadvantaged businesses, women-owned, HUBZONE, and Native American owned firms. The goal of CSA is to put the private sector to work for the public good.

General Overview

Thank you for the opportunity to be here today and to share an industry perspective on the Revisions to Circular A-76 which were released last month by the Office of Management and Budget (OMB). The Revisions represent an improvement in the competitive sourcing process and should increase private sector competition for Government services, which is good for the taxpayer. I am hopeful that these Revisions put us back on course and will encourage companies to jump back into the competition – that will be the ultimate measure of success for the revised A-76 process. Competition is a key tenet of the President's Management Agenda, which is aimed at improving the performance of Government and making Government more citizen-centered, results-oriented and market-based.

CSA has worked with and on (including previous re-writes of) Circular A-76 since the Association's founding in 1965 – at a time when no one else was interested in even talking about the Circular or making it work. Now, public-private competitions are a much discussed issue, and key to agency performance. Our years of persistence are paying off. Certainly, the recent increased attention has not been without its challenges, but we will continue to tell our story of the benefits to be achieved from this process.

As we have consistently noted (in testimony and congressional letters), CSA is interested in fairness and best value. More and more of our companies have walked away from competitions with the Government because of chronic problems found in the implementation of the "old" system. As I already stated, I am hopeful that these Revisions put us back on course and will encourage companies to jump back into the competitions.

The intent behind A-76 (*i.e.,* to establish a process for public-private competitions) has never really been in question. But, implementation of the "old" A-76 Circular turned it into a lengthy, expensive and unnecessarily convoluted process, leading all sides to declare that it was unfair. Many companies would no longer bid on A-76 competitions under the old rules. Without active bidding by industry there is no true competition and the Government would then never know if it had gotten the best deal.

The Revisions are aimed at addressing this problem by tightening the timelines for competitions. They make the process fairer by treating the public sector proposals ("tender offers") like private sector bids and by evaluating all proposals, both public and private, under the same set of rules. Optimistically, these Revisions should lead to increased competition, producing not only cost savings for the Government but also encouraging innovation, which is the key to improving the quality of service delivery.

While the new rules are easier to navigate, and there appears to be greater clarity and consistency as well as enhanced accountability, implementation remains key – or, as we have seen happen too often in the past, good intentions will go down the drain. Fairly implementing this for public-private competitions will be a challenge, filled with nuances and potential pitfalls, but we stand ready to aggressively work with the Congress and the Administration to ensure the goals of the A-76 Revisions are fully achieved. This is the right thing to do.

Commercial Activities Panel

Much of the Circular A-76 Revisions are based on recommendations made by the Blue Ribbon Commercial Activities Panel (CAP), of which CSA member Mark Filteau of Johnson Controls, and public sector union leaders were members.

In its April 2002 report to Congress, the Panel unanimously adopted ten key principles that should guide agency sourcing policies. To varying degrees, these principles are reflected in the Revisions, particularly the following:

- Recognize that inherently governmental and certain other functions should be performed by Federal workers;
- Be based on a clear, transparent, and consistently applied process;
- Ensure that, when competitions are held, they are conducted as fairly, effectively, and efficiently as possible;

- Ensure that competitions involve a process that considers both quality and cost factors; and
- Provide for accountability in connection with all sourcing decisions.

These sourcing principles were used by the Panel to assess the A-76 process (as last revised in 1996) and make its recommendations, the most obvious one being the adoption of a process governed by the Federal Acquisition Regulations (FAR):

> *"That in order to promote a more level playing field on which to conduct public-private competitions, the government needs to shift, as rapidly as possible, to a FAR-type process under which all parties compete under the same set of rules."*

Shifting competitive sourcing to an approach governed by the FAR, the A-76 Revisions move to a process that is fair and time-tested with clear rules. Unlike the current A-76 rules, the FAR offers a well-documented process that has the confidence of both the Government and industry. Indeed, a system based on the FAR is one that Government procurement officials are most familiar.

Old versus New A-76 Process

In its April 2002 report to Congress, the CAP highlighted a common complaint against the "old" A-76 process:

> *"Both Federal employees and privates complain that the A-76 process does not meet the principles' standard of a clear, transparent, and consistently applied process."*

As implied in the CAP findings, private sector executives increasingly have concluded that the old A-76 process was so flawed, intrinsically unfair and biased toward the Government that it was not prudent business to devote marketing resources to public-private competitions. While A-76 procurements represent an important potential source of new business, companies must be persuaded that the competition will be reasonably fair before they will aggressively pursue A-76 opportunities; and they will only do so on a highly selective basis. However, in the past few years, participation by qualified companies has declined since the competitions were perceived as being biased toward the Government. That is unfortunate because it deprives the Government of valuable competition and because many of those companies have excellent business practices that could contribute significantly to improved infrastructure efficiency. Unfortunately, the real loser here is the taxpayer, because the perceived A-76 "gamesmanship" (in the old process) results in limited competition and ultimately potentially higher costs to the Government.

CSA members have consistently cited five areas in the old A-76 process that needed to be addressed and improved:

- **Fairness:** Companies need to know the competition will be fair from the outset. If the rules are different for in-house bids, and companies are greeted by bias and hostility from the leadership overseeing the competition, most companies will decline the opportunity. As the saying goes, "If you want competition, then you invite and attract competition."
- **Timing:** As commercial activity studies stretched out and procurements delayed, uncertainty plays havoc with individual contractor's ability to schedule bid and proposal resources. Delayed competitions are costly. Setting a schedule and meeting schedule milestones are important.
- **Cost Comparison:** Nothing is more important than a fair cost comparison and fair cost comparison procedures. If either is seen as unfair and the Government is continually accused of "gaming" the system, then contractors will not bid on future procurements. Nothing is more important than the integrity of the procurement process; unfortunately, a number of GAO A-76 protests have focused on whether fair cost comparisons were conducted.
- **Unlimited Attempts for the MEO:** Under the old process the in-house team was provided unlimited attempts to correct a flawed proposal and make it technically acceptable. This was not only unfair but added process delay. Most importantly, it allowed the MEO to "game" the system. By "low-balling" or submitting technically unacceptable proposals, the evaluating team (either the IRO or SSA) could continue to send back to the MEO its proposal to fix whatever is unacceptable. This fixing or "pulling up" process would continue until the in-house team submitted the very least technically acceptable proposal. When such a proposal is priced, by definition it should result in the lowest priced proposal possible, in a cost comparison. Even if a contractor submitted a proposal that also just met the bare minimum threshold of technically acceptability, it would be unlikely that the contractor could overcome the 10% conversion factor, which advantages the MEO. The result was a process under which the contractor loses every time.
- **Accountability:** A winning MEO must be held to performance standards and costs as proposed. Anything short of full accountability for the winning entity deprives the Government of getting the best proposal and destroys the integrity of the process.

CSA has never advocated that all Government services be contracted to the private sector. But as we continue to reinvent Government we must focus on competition. And that focus requires a balanced, responsible and unyielding commitment to exploring new ideas, challenging old prejudices and looking carefully at what services the Government must provide. It also requires a careful examination of who, inside or outside of Government, is best positioned to provide each service in the most efficient and effective way. This means, too, that the Government should adopt from the best of private enterprise those tools that foster the necessary incentives and rewards for high performance. And it must follow a fair process designed to protect the interests of the taxpayer and address the legitimate concerns of the current Government workforce while, at the same time, ensuring that the Government operates in a maximally efficient manner.

It is too early to tell whether CSA members and other private sector firms will jump back into the A-76 process. It is important to recognize that shifting to a FAR-type

process is not a cure for all the problems facing competitive sourcing. Significant issues remain. Cost comparisons between public and private sector bids will continue to demand careful scrutiny and fairness. Improvement is also needed in developing quality statements of work, the heart of the solicitation. Also, all competitors need to be ensured of equal access to relevant information, including workload data, in order to make credible proposals.

And there needs to be continued high-level agency support, along with an on-going dialogue between the agency and OMB. To a certain extent, this is recognized in the Revisions, which requires that agencies post lessons learned and best practices on SHARE A-76! Furthermore, Federal agencies should consider developing teams to provide consistent advice and training on preparing proposals for in-house competitions.

Comments on Final Circular A-76 Revisions

I believe the Revisions will improve the process in the following areas:

Fair Act Inventories

The Revisions spell out how agencies should develop their annual inventories as required by the Federal Activities Inventory Reform (FAIR) Act. And it requires agencies to inventory not only their commercial activities, but to include inherently governmental activities as well. This is important since it sheds additional sunshine on the Government's activities. Indeed, nothing in the FAIR Act ever prohibited the inclusion of inherently governmental activities on the inventory.

The one area that CSA continually found fault was the establishment of Reason Codes in the agencies' FAIR Act inventories. Challenges could be made to the inclusion or exclusion of a commercial activity but not to the application of a specific Reason Code. Our concern was that an agency could identify functions as commercial and, using the Reason Codes, protect the functions from competition. The Revisions now properly allow challenges to the applicability of Reason Codes. This will enhance agency accountability.

Time Frame

One area in particular that CSA has long promoted is shortening the time for the competitions – the revised Circular requires standard competitions to be completed within 12 months. This is definitely more reflective of a FAR-based process. In addition, predictable timeframes will facilitate the involvement of small businesses in the A-76 competition process because small businesses (with their limited credit line and marketing budgets) could rarely afford to participate in the previous A-76 process, which dragged out 2-4 years.

For the Government, the business case for outsourcing through the A-76 process has been made. Accordingly, it is in the Government's best interest to rapidly execute a

competition in order to quickly reduce costs and improve efficiencies. Lengthy competitions run counter to good business practices and end up costing American taxpayers unnecessary budget dollars.

In addition, the Revisions emphasize the preliminary planning that an agency must do "upfront" – this focuses on developing an acquisition strategy, prior to announcement for either a streamlined or standard competition. This, in turn, should assist agencies in developing better performance work statements and solicitations, etc.

Evaluation Factors

The process will be fairer by treating the public sector proposals like private sector bids and by evaluating all proposals, both public and private, under the same set of rules (the FAR) and allowing agencies to make decisions based on cost or on cost technical trade-offs. For the first time, public sector employees will be allowed to make offers based on best value, thereby encouraging innovation from those who are most familiar with the work – the Government workforce.

Under the old A-76 process, the public sector proposal was driven primarily to slash cost, reduce personnel, and only meet the minimum performance level required by the statement of work. Under a FAR-based process, public sector employees would be encouraged to come up with innovative approaches and solutions, not discouraged by a process in which cost is the only factor.

Creating the situation (as the old A-76 rules did) where Government organizations are ultimately competing with the private sector on a cost rather than a quality-dominated basis is in sharp contrast with the quality/best value principals that were strongly enunciated in the National Performance Review. Ironically, as Government acquisition policy has significantly moved away from price as a key factor and toward best value, the old A-76 process for public-private competitions continued to require simplistic cost comparisons.

The importance of "best value" procurements has been highlighted in the House Armed Services Committee Report on the 1994 Federal Acquisition Streamlining Act. The report states, "*The committee notes that, over the past decade, the acquisition system has become more complex and sophisticated. This has made it increasingly important to balance quality discriminators, such as technical capabilities, against price and other considerations in the source selection process. Therefore, the committee believes that the use of value-based contracting or 'best value' is long overdue and that this will cause contractors to perform better and to produce better products.*"

Some have argued that "best value" is, by its very nature, subjective. I would not agree. Best value may not mean the same thing in every instance, but there is no reason why the Government should not be able to define, with reasonable precision, what best value means on a specific solicitation. Best value should give the Government the flexibility to buy precisely what it needs, with a responsible balance between price and

features. And, consideration of best value should always include past performance because best value is unlikely to be provided by a contractor with a poor record of prior performance. Nor should best value be used to protect popular incumbents or to eliminate competent but lower priced offers from an A-76 competition. In order to achieve these goals, award criteria should be clearly and unambiguously set forth in the solicitation, and should be specifically tailored to the requirements of the mission, system or installation.

As I have already mentioned, the Revisions allow for best value, but as the Federal Register rightly noted, *"the Circular will continue to require the meaningful consideration of cost as a factor in all public-private competitions."* Best value does indeed equal quality and cost!

Accountability

The Revisions enhance the accountability associated with competitive sourcing. The FAR-type approach offers a procurement process that is more transparent than the old A-76 process. Conflict of interest rules are more clearly defined. Competition officials and individuals participating in the process must comply with procurement integrity, ethics and standards of conduct rules.

Most important, if the public sector wins the competition, its proposal will be treated like a contract ("letter of obligation"). This means that Government officials will monitor the cost and service performance levels of the public sector's Most Efficient Organization (MEO). The MEO's performance will now become a past performance factor – the basis for whether they can win future work, just like a contractor.

One criticism has been that there is no system in place to hold contractors accountable, or mechanisms for tracking the cost and quality of service contracting. Unfortunately, the myth that contractors are not accountable continues to be perpetuated, despite rigorous accountability during competition, during performance of the work, and at the end of the contract.

Virtually all service contract work is subject to intense competition between private sector competitors. These competitions are closely monitored by Federal officials and subject to pricing, conflict of interest and past performance evaluation under strict guidelines.

The FAR requires private sector contractors to open their books and records for financial audits. Types of audits performed under a typical Government contract include: pre-award audits; periodic financial audits during the contract; invoice audits; incurred cost audits; and final closeout audits just to name a few. The FAR also requires most service contracts to contain a myriad of other requirements, governing labor and compensation, safety and environmental regulations – all subject to oversight and audits. With regard to performance, most of our service contracts require quarterly reviews. Our

customer examines every aspect of our work to determine if we are meeting the performance metrics detailed under our contract.

Under the Revisions, now all providers – including the public sector – will be scrutinized to ensure that they (public or private) make *"good on their promises to the Government."* (Federal Register notice, May 29, 2003). And agencies will be required to track the execution of both streamlined and standard competitions, again no matter who the provider is (public or private sector).

Disagreements with the Final Circular A76 Revisions

Overall, we are very optimistic over the intent and ultimate implementation of the final A-76 Revisions. However, there are a few areas on which I would like to share our concerns:

Transmittal Memorandum

> *"The longstanding policy of the federal government has been to rely on the private sector for needed commercial services. The competitive enterprise system, characterized by individual freedom and initiative, is the primary source of national economic growth."*

This has been a fundamental premise since 1954, and supported by both Democratic and Republican Administrations.

I would like to register the concern of CSA members over the elimination of not only this longstanding Government policy statement related to reliance on the private sector, but also the elimination of the presumption in the proposed November 2002 that "all activities are commercial in nature." We recognize that the current Administration's general policy, as noted in the Federal Register notice, is a reliance on competition. However, we do not believe that the policy statements in question are contrary to that policy. We would urge that the policy statement in effect since 1954 be included in the Circular.

Direct Conversion

CSA members have long supported the ability of agencies to directly convert work to the private sector. This increases agency flexibility to ensure it is receiving the best value to meet its mission needs. It would also help agencies in meeting their small business goals. Therefore, we are concerned over the total elimination of the direct conversion process.

For now, we will reserve comment on the streamlined process. We recognize the intent, and we sincerely hope that agencies will indeed avail themselves of the process, rather than deciding it is too hard to accomplish in the timeframe allowed, and either not do anything or use the standard competition. The "devil will be in the details" to ensure

its proper implementation. We would suggest that consideration be given to increasing the threshold from 65 to 100 FTES. And, we do applaud the elimination of the differential in the streamlined process since this will ensure that agencies have the necessary latitude to make decisions based on their market research. At some point, we would suggest that OMB review the feasibility of eliminating this differential for standard competitions as well.

One concern, for either side, is that there is no appeal process – even at a contracting officer level – to challenge an agency decision. Such an appeal process would necessarily be structured to be very limited (e.g., tight timeframes), but it may be necessary to ensure fairness.

[Note: While the Revisions do not specifically state this, current statutes (e.g., the annual Defense appropriations acts) allow for direct conversion to Native American-owned businesses; we presume that nothing in the revised Circular is counter to those statutory requirements.]

Inter-Service Support Agreements (ISSAs)

The proposed November 2002 Revisions included important modifications related to Inter-Service Support Agreements (ISSAs). Unfortunately, this section was eliminated from the final Revisions issued on May 29, 2003.

The Revisions noted that Circular No. A-97 remains in effect. However, modifications to the Circular addressing recompetition and "grandfathering" of certain ISSAs, which had been proposed in 2001, have never been formally adopted. The November 2002 proposal would have put into effect those modifications by ensuring that all ISSAs are subject to recurring recompetition as well – including both new agreements as well as those originally grandfathered out of any competition requirement. This was a step in the right direction toward ensuring that Federal agencies obtain the best value for the American taxpayer. The 2001 proposed changes to A-97 are not addressed in the Revisions issued on May 29 and, therefore, are still in question.

CSA, along with its industry counterparts, has long been concerned that interservicing agreements among Federal agencies, as well as the military services, are used as a means to avoid outsourcing and privatization. We do not believe that ISSAs should be exempt from competition. Requiring the use of competitive procedures for all ISSAs is consistent with the Economy Act (31 U.S.C. 1535), the Intergovernmental Cooperation Act (31 U.S.C. 6505), and the intent of the Federal Activities Inventory Reform (FAIR) Act (P.L. 105-270) and the Government Management and Reform Act of 1994 (103 U.S.C. 356).

Other Issues related to the A-76 Process

I would like to highlight a few other issues related to the A-76 Process that were not specifically addressed in the Revisions.

Protest Rights

Since the public sector is competing under the same set of rules and is treated as a true bidder, the MEO should have the right to protest to the General Accounting Office (GAO) or file in the United States Court of Federal Claims to resolve competition disputes. The proposed Revisions are silent on this particular issue, presumably leaving the question to be resolved by GAO and the Court. However, logical reasoning and fairness led the Commercial Activities Panel to recommend that appeal rights be given to the public sector. In other words, if the public-sector team (represented by the Agency Tender Official) is truly treated as a bidder, it should have protest rights.

On June 13, 2003, the GAO issued a notice soliciting comments regarding two key legal questions related to protest rights for the agency MEO. CSA, along with other industry associations, will be providing comments on the issues raised by GAO.

Treatment of Workers

Taking care of Government workers who are impacted by outsourcing decisions is an issue the private sector takes very seriously. Former Government workers affected by a conversion of their jobs to contract are typically offered a "right of first refusal," under which the workers are given first priority for employment for those jobs for which they are qualified – and this is recognized in the Revisions. In many instances, persons stymied in their desire for promotion find that working for a contractor provides upward mobility they did not previously enjoy. Contractors are not typically strictly bound by seniority in making employment decisions. As a result, dramatic improvements in a workforce can be achieved just by selecting highly qualified personnel for supervisory and/or key technical positions. This infusion of fresh enthusiasm can invigorate a workforce even when the workforce as a whole remains relatively unchanged due to "right of first refusal" protections. Furthermore, responsible contractors understand that satisfied customers depend, to a considerable degree, upon satisfied employees. All responsible contractors treat benefits management as an important element of good labor relations.

It has been said that contractors have incentives to reduce costs by requiring inferior compensation packages for those who perform Government work. The fact is that the Service Contract Act (or the Davis-Bacon Act) governs the vast majority of wages paid by Federal service contractors to their employees. If there is concern over the compensation packages for service contract employees, it should be directed to the current wage and benefits standards set by Department of Labor, not the competitive sourcing process.

Finally, there should be early engagement with Federal employees to both keep them informed and answer their questions regarding the uncertainty of the process.

Performance Based Services Acquisition

The November 2002 proposed Revisions stated that a Performance Work Statement (PWS) "that is developed in a Standard Competition shall be performance-based with measurable performance thresholds and may encourage innovation." While this specific statement is not included in the final Revisions, we presume that contracting officers will continue to be encouraged to use performance-based contracts. This process specifies the Government's objectives in terms of outcomes or results, but leaves it to the contractor to determine the best way to achieve them.

However, training remains the number one stumbling block to full and successful implementation of performance-based contracting. It must be enhanced if performance based services acquisition (PBSA) is to become successfully implemented. PBSA requires new evaluation techniques, new management approaches (involving the entire acquisition team) and improved contract relationships.

Small Business Considerations

We remain hopeful that the one voice that has not been widely heard in the debate over A-76 – small business – would receive a fairer hearing under the FAR-based process. Few, if any, small businesses today can afford to compete on an A-76 competition. The 2-4 year time lag alone (in the current A-76 process) made the old process prohibitively expensive for small businesses. Will a FAR-based process ensure fairness for small businesses? We believe it will.

But there are certain issues that must be considered that were not specifically addressed. These deal with small business set-asides, minority business preference programs (e.g., 8a or small disadvantaged businesses set-asides), and HUBZones, as well as Native American preferences, and disabled-veteran and women-owned small business preferences. CSA membership includes many small companies that fall within these categories – and we want to ensure that the FAR programs and protections currently in place will be continued.

Conclusion

The challenge we face today is to implement this new public-private competition process – one that encourages competition, treats public sector employees with respect, and provides for a fair system under which all competitors, public and private, are judged under the same set of rules. The spirit of the Revisions lives up to that challenge.

Thank you for this opportunity to testify.

Mrs. JO ANN DAVIS OF VIRGINIA. Mr. Soloway.

Mr. SOLOWAY. Mrs. Davis, members of the committee thank you for the opportunity to testify today. The Professional Services Council greatly appreciates your continued leadership in this important area.

Today, across the Nation and around the world, hundreds of thousands of hard-working Americans are busy supporting the many and varied missions of virtually every government agency. They are public employees, private sector employees, employees of non-profits and of universities. Despite the hyperbolic rhetoric to the contrary, the truth is that this diverse work force, public and private, has repeatedly demonstrated its collective commitment to service, to excellence and to the Nation; and it's in the context of that reality that I would like to address the principal focus of this hearing.

The revisions to A–76 seek to bring the process into closer alignment with the unanimously agreed-to, common-sense principles recommended by the Commercial Activities Panel on which I was privileged to serve. Those sourcing principles can be summed up as follows: First, sourcing must be viewed as a strategic process and not one governed by arbitrary goals or, for that matter, arbitrary limitations. Second, sourcing policy must be founded on the tenet of equal rights and equal responsibilities for all bidders, public and private.

The question before the committee today is whether the revisions to A–76 achieve those goals. To that, my short answer is that the revisions represent a significant and important step forward. At the same time, there remain some very important areas in which improvement is still needed. Let me just mention a few specifics.

[The information referred to follows:]

PERPETUATING THE MYTHS:
AFGE AND OMB's REVISIONS TO OMB CIRCULAR A-76

In recent congressional testimony, the American Federation of Government Employees (AFGE) listed a litany of complaints and concerns regarding the Administration's May 29, 2003 revisions to Circular A-76 governing the policies and processes that guide public-private competitions.

While the Circular still needs additional work to become the optimally effective management tool that it can be, AFGE's complaints with the revisions are both inconsistent with the concept of fair competition and with the ten overarching principles governing public/private competition that were unanimously adopted by the 2002 Commercial Activities Panel, chaired by the Comptroller General and on which the President of AFGE was a member. Those principles focus on a sourcing policy that is based on an agency's mission and strategic needs and conducting source selections through a process that provides both equal rights and equal responsibilities for all bidders.

Ironically, despite the union's role on the CAP and support for those principles, many of AFGE's complaints about the new circular go in the opposite direction. Below are some examples of AFGE's concerns, as articulated in their recent testimony,[1] followed by the real facts surrounding the issues raised.

I. **Myth:**
The Streamlined Process involves a "second rate" competition process, fosters more direct conversions (the shifting of work from the government to private contractors without the incumbent government workforce participating in the competition), and obviates any requirement that the contractor demonstrate "appreciable" savings.

Fact:
The new Streamlined Process does not promote direct conversions. Rather, it requires each agency to conduct a substantive analysis of alternatives—which can include a full up competition—to determine whether retaining the work in-house or outsourcing it makes the most sense. Since the process is limited to activities with 65 full-time equivalent's (FTE's) or less, such analysis is more than adequate to make sound business decisions for the government, provided that the analysis is serious, transparent and well documented. Indeed, the accountability of the Streamlined Process is where our collective concerns should be focused.

Moreover, when an agency determines under the Streamlined Process that work should be outsourced, a "direct conversion" does not equate to a sole-source award. Other than in limited, statutorily driven cases, all work that is

[1] Before House Government Reform Committee June 26, 2003 - http://www.afge.org/Documents/Testimony_2003_06_26.pdf

outsourced is subjected to robust competition. While the Streamlined Process contains no arbitrary minimal savings requirements, it is ludicrous to suggest that an agency, particularly in the current resource constrained environment, could afford to even consider outsourcing a function unless doing so resulted in savings at either the functional and/or organizational level, or both.

In addition to the issue of transparency and accountability, the only real issue with the Streamlined Process is really one of competition. Over the last several years, more than 90% of all "streamlined competitions" conducted under the old A-76 process were retained in-house and almost always without any significant competition. For those who believe competition is the most effective means of driving higher efficiency and performance, that is the issue of greatest concern.

II. **Myth:**
The revisions considerably overcharge federal employee bids for overhead.

Fact:
The Circular requires that the government use a fixed twelve percent for overhead costs for government bids because the government financial systems are incapable of calculating precise overhead figures such as those required of contractors. Concerned about the intentional underestimating of overhead by government MEOs, in 1996 OMB established the fixed rate for overhead (according to DoD, the average overhead factor previously bid by MEOs had been in the 1.5% to 2.5% range). The 12% figure is based on various government assessments of what the actual overhead for government activities should be (based on the unique government definition of overhead).

The unions and the DoD Inspector General are technically correct that the 12% overhead factor is not supportable by absolute data. But this is a function of gaps in the government's financial and management systems, not a failure of the Circular. It is neither capricious nor unfair. Indeed, if anything the rate significantly underestimates overhead. Actual rates are preferred and government bidders should be required to develop actual rates as soon as possible.

III. **Myth:**
Contracting out "undercuts" federal employee pay and benefits.

Fact:
As a recent General Accounting Office study reported, there is no evidence that contracting out leads to reduced pay and benefits for federal employees. For wage grade positions, contractors are required to pay no less than the wages and benefits set by the U.S. Department of Labor, based on the prevailing wage rate for the work covered. Indeed, even as the government

employee unions decry the poor pay and conditions offered in the private sector, they are conducting a parallel campaign for higher federal wages, citing a "pay gap" between the public and private sectors for comparable work. There is plenty of evidence to support the "pay-gap" contention. However, they cannot be right on both points.

IV. **Myth:**
The revisions to A-76 "introduce a controversial and subjective" best value process that is "unnecessary."

Fact:
Over the last decade, Congress and two successive Administrations have worked together to improve federal procurement processes. One of the key improvements has been the advent of "best value" contracting, which recognizes that cost, while always important, is not the only factor to be considered in procurement, particularly when the requirements involve a meaningful degree of technology or complexity. Past performance, technical skills, technology infusion, innovation, management, and more are all factors that virtually everyone agrees ought to be included in the agency's evaluation of bids submitted. Best value is where cost and quality meet. It is neither controversial nor subjective. With the sole exception of A-76 competitions, virtually all federal procurements have long had the authority to use such strategies.

It is fallacious to suggest that best value is either overly subjective or biased against any one bidder, public or private. While best value is designed to enable the matching of source selection criteria to a given procurement, it contains numerous protections against capriciousness or abuse. It is the common procurement language of government acquisition and reflects the common means by which most institutions and individuals make acquisition decisions. Best value is the common sense approach to federal procurement.

V. **Myth:**
The revisions impose competition requirements on federal employees but not on contractors.

Fact:
By law and by regulation, the vast bulk of all government service contracts must be re-competed every few years. The A-76 revisions thus do not need to address this issue as it relates to contractors. Indeed, the revisions begin to require that government activities that are commercial in nature be subjected to some of the same competitive pressures contractors face everyday. That is good for the agency and good for the taxpayer.

VI. **Myth:**
The revisions hold federal employees "absolutely accountable" for failure, but not contractors.

Fact:
All contractors are bound by contracts—binding, legal agreements. Government activities that win A-76 competitions under the revised Circular will now be required to enter into a Letter of Obligation, the closest process to a "contract" by and between elements of the government. How could this be unfair to the government entity? Moreover, by law, the Letter of Obligation cannot be truly "binding" and there is no way for the government to NOT pay its employees if they fail to perform, even though contractor payments can be and often are withheld if the contractor does not perform. The need to focus in this area is supported by studies from the Center for Naval Analyses and various GAO reports, that make clear that the government has far more insight into and information about expenditures on individual contracts than it does on expenditures of organic activities.

VII. **Myth:**
Contractors, but not federal employees or their unions, would have standing to protest source selection decisions before the General Accounting Office and Court of Federal Claims.

Fact:
It is true that contractors have standing to protest source selection decisions before the GAO and the Courts. It is also true that federal employees and their unions do not have such standing. However, contractor employees and their unions do not have such standing either.

By law, standing to challenge an agency action at GAO or in court is only available to the entity that has the financial and legal responsibility for the bid and for performance. Thus, private sector employees and their unions, while clearly "affected parties" in a source selection decision, do not have standing to challenge an adverse action because they do not meet the statutory test. The same applies to the government.

Under the revised A-76, it is possible that the government's Agency Tender Official (the official responsible for tendering the government's bid and signing the government's Letter of Obligation in the event the government team wins the competition) will be granted standing to protest before GAO. However, it is inconceivable that such standing would be granted to federal employees and/or their unions for the reasons stated above. To do otherwise would be to directly violate the spirit and letter of numerous federal laws and longstanding legal precedent in federal management, procurement, and labor

statutes. It would, for the first time, give federal employees a right of individual action never before granted and raises significant constitutional questions revolving around the government's (or it's employees') ability to "sue" itself over a management decision.

VIII. **Myth:**
The revisions further narrow the definition of "inherently governmental."

Fact:
The definition of inherently governmental (functions that cannot be outsourced because their nature is such that they must be performed by government employees) is not significantly different from the 1992 policy letter issued by OMB defining inherently governmental functions. Moreover, the new Circular removes the 55 year old policy statement that states the government's intention to rely on the private sector for the provision of goods and services.

IX. **Myth:**
The revisions require nothing new in the way of tracing the cost and quality of work performed by contractors.

Fact:
The revised Circular places on all parties, public and private, the same responsibilities for meeting the terms and performance requirements of their contract/letter of obligation. Nonetheless, while contractors are still held to execute the contracts they sign, and under which they simply do not get paid for a failure to perform, government entities will be under no similar requirement.

X. **Myth:**
The revisions hold federal employees, but not contractors, to five year contracts and allow contractors to win contracts on "the basis of how much time they spent instead of what they actually accomplished."

Fact:
Contractors, like federal entities that win competitions, will be required to adhere to the terms of their performance agreements. Indeed, one critical goal of the A-76 revisions is to ensure accountability of performance whether it is by federal employees or contractors. While the typical Letter of Obligation with a winning government entity will be five years, much as is the norm with contractors, government employees will also have the ability for non-competitive extensions based on exceptional performance, such as is now possible in only rare instances for government contractors.

XI. **Myth:**
Under the new A-76, and the OMB "quotas/'Proud to Be" goals, privatization would be used to the exclusion of all methods of improving operations (i.e., strategic sourcing).

Fact:
This statement ignores two critical facts: first, the administration's competitive sourcing "quotas" no longer exist and were never "privatization" quotas. The "goals" were for competition and were, and remain, completely agnostic relative to who wins the competition. Competition is the goal because competition is widely agreed to be the most effective means of driving higher performance and higher efficiency. In light of the recent study in which 90% of government managers acknowledged that their agencies were not yet delivering top quality service to their customers, it is government's responsibility to utilize the best possible tools to improve service and enhance efficiencies.

Second, strategic sourcing, while a popular concept, has unfortunately proven to be a tool for avoiding competition and retaining the status quo. The most aggressive practitioner of strategic sourcing to date has been the U.S. Navy, which has done more than twice as much "strategic sourcing" as it has competitive sourcing. The results, according to the Navy itself, are that strategic sourcing initiatives are averaging only about 14% percent savings, while the Navy's competitive sourcing initiatives (based on the procedures of the previous Circular) are averaging three times as much (43%). This is just one more example of the effectiveness and importance of competition, even when conducted between public and private sector entities.

Mr. SOLOWAY. First, as you know, the CAP unanimously recommended that the government consider both cost and quality factors in its sourcing decisions, otherwise known as best value contracting. Until the A–76 revisions were released on May 29, only procurements conducted under A–76, less than 2 percent of all Federal procurement, were prohibited from exercising this commonsense buying strategy. Thus, we applaud the creation of a modified form of best value within the construct of A–76.

However, under the new Circular, the authority for best value is limited principally to information technology, new work or already contracted work. Why does the authority stop there? Do we really want to return to the old low-bid mentality of the past? If existing contracts performed by the private sector can be competed under best value criteria, why does the same not apply to work currently performed by the government?

Additionally, even when best value techniques are permitted under the new Circular, cost must represent at least 50 percent of the source selection evaluation. However, it is easy to conceive of circumstances in which cost, even if it is the single most important evaluation factor, will not and cannot account for 50 percent of the selection, given the range of other factors that also need to be considered. This arbitrary requirement thus limits the government's ability to make smart business decisions.

We are also concerned that, under the Circular, the past performance of only one party, the government, may not be considered. This prohibition makes leveling the competitive playing field very difficult and, more importantly, significantly disadvantages the source selection process and the agency.

Among its most notable improvements, the revised A–76 requires all bidders, public or private, to respond to the same solicitation, submit their bids within the same timeframe, be evaluated on most of the same criteria and enter into a binding agreement under which performance will be monitored and the work subjected to continual competitive pressures. This reflects a critical commitment to fairness and accountability of the very kind unanimously recommended by the Commercial Activities Panel.

In the area of appeals and protests, the Circular authorizes administrative appeals from three parties, all of whom had similar appellate rights under the old A–76—the affected contractors, the government, and the affected Federal work force through its elected representative.

The significant question now being asked is whether protest rights at the GAO—beyond the agency level appeal—should be extended to the government or the Federal work force or both. Under the new Circular, we think it is possible that the GAO could determine that an agency tender official qualifies for standing to protest before the GAO.

As this committee well knows, standing is derived from the Competition in Contracting Act and is limited for good reason to those individuals with the authority to sign and certify a bid and to sign and be liable for performance under a contract. For the most part, the revised A–76 places on the government most of the rights and responsibilities shouldered by other bidders. There are many com-

plex legal issues associated with a government-filed protest, but it is an issue worth exploring further.

On the other hand, it is inconceivable as a matter of equity or law that Federal employees as individuals or through their elected representatives would be or should be granted standing. While it is true that companies have the standing to protest, neither their work force nor their unions have such standing. Although all employees, public or private, are affected by decisions made in a competition, they do not have the legal or financial liability for the bids submitted or for post-award performance. This is true of individuals and of unions, be they public or private.

There are also a number of areas of the Circular that we believe merit further and immediate action by OMB.

First, it's important that the costing methodologies be substantially revised. For example, the revised A–76 requires that a cost-realism analysis be conducted on both public and private bids, and we certainly support that. At the same time, the cost manual, the use of which is required for government MEOs, is designed to create only a cost model of the government MEO. There is a vast difference, however, between cost modeling and cost realism. A model reflects what things should cost. Cost realism is geared to what they really will cost. This is a continuing weakness of the process that must be addressed without delay.

The revisions also delete all coverage of the large, complex and largely hidden web of activities known as Interagency Support Service Agreements [ISSAS]. While OMB has stated its intent to address this issue through separate policymaking, we see no reason that new ISSAs should not be subject to competition, as was required under the 1996 revisions to the Circular.

Finally, the revised Circular makes no mention of waivers at all. In those cases where a public-private competition does not make sense from the perspective of cost, technical skills, technology, mission or the agency's ability to adequately recruit, retain, support and reward a work force, a waiver is the right answer. In such cases, there should be a requirement that interests of the work force be made a significant source selection factor, but for the reasons I mentioned earlier, we believe the Circular should clearly articulate a policy permitting waivers and appropriate circumstances.

Ms. Davis, members of the committee, we believe OMB has done a good job of making significant improvements to the A–76 process. We hope the revisions that OMB has made will lead to robust competition and, even more importantly, to outcomes that are in the best interest of the government. I look forward to answering any questions you might have and thank you again for the opportunity to appear.

Mrs. JO ANN DAVIS OF VIRGINIA. Thank you, Mr. Soloway.

[The prepared statement of Mr. Soloway follows:]

TESTIMONY

by Stan Soloway
President
Professional Services Council

before the

COMMITTEE ON GOVERNMENT REFORM

U.S. HOUSE OF REPRESENTATIVES

June 26, 2003

2101 Wilson Boulevard, Suite 750, Arlington, VA 22201-3009, 703/875-8059, Fax 703/875-8922, http://www.pscouncil.org

TESTIMONY OF

STAN SOLOWAY
PRESIDENT
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JUNE 26, 2003

Mr. Chairman, members of the Committee, thank you for the opportunity to testify before this Committee again as you continue your review of public/private competitions, specifically those conducted under OMB Circular A-76. This issue has been at the forefront of Congressional interest for several years and the Professional Services Council appreciates your continued leadership in this important public policy area.

My name is Stan Soloway and I am president of the Professional Services Council (PSC). PSC is the leading national trade association representing the professional and technical services industry doing business with the Federal government. PSC's approximately 150 member companies perform more than $100 billion in contracts annually with the federal government and other entities, from information technology to high-end consulting, engineering, scientific and environmental services.

Today, across the nation, and around the world, hundreds of thousands of hard working Americans are busy supporting the many and varied missions of virtually every government agency. They are public employees, private sector employees, employees of non-profits, and of universities. They are mechanics, scientists, engineers and clerks; they are software designers, management experts, security guards, social scientists and more. They are the work force that ensures the delivery of government services, supports our troops abroad, fights hunger and AIDs, searches for the next medical breakthrough, and works to help modernize government systems to enable an ever-higher quality of service to the American people.

Despite the hyperbolic rhetoric to the contrary, the truth is that this diverse workforce, public and private, has repeatedly demonstrated its commitment to service, to excellence, and to this nation.

It is in the context of that reality that I would like to address the principal focus of this hearing -- the process for determining the best source for performance of government functions that are commercial in nature.

I had the privilege of serving on the Congressionally-mandated Commercial Activities Panel, chaired by the Comptroller General. The panel itself had representation from all stakeholders and, needless to say, the differences between some of us were and remain significant. At the same time, as this committee has heard from the Comptroller General directly, the Panel

achieved unanimity on ten overarching principles to govern sourcing policy. In previous hearings, we have discussed those principles in some detail so I will not repeat them here. Those sourcing principles, which were designed to be taken as a unified whole, can be summed up as follows: first, sourcing is and must be viewed as a strategic process, and not one governed by arbitrary quotas or goals, or, for that matter, arbitrary limitations; second, sourcing policy must be founded on the tenet of equal rights and equal responsibilities for all bidders, public and private.

As such, the Commercial Activities Panel unanimously opposed the kind of targeted, arbitrary limitations currently being aimed at the Corps of Engineers, the FAA, and the Department of Interior. The CAP unanimously recognized the fundamental importance of competition as a critical strategic tool. These efforts are not only arbitrary in nature and go in the opposite direction; they also severely inhibit the agency's ability to utilize competition to drive higher performance and efficiency.

OMB May 29 Revisions

The revisions to Circular A-76 that were issued by OMB on May 29 seek to bring the public/private competition process into closer alignment with those unanimous, common sense, principles of the CAP. The revisions seek to simplify what the CAP found to be a hopelessly arcane and outdated process; and they seek to bring the public-private competition process into closer alignment with the processes contained in the Federal Acquisition Regulation that governs virtually all other government procurement and which is based on that vital tenet of equal rights and equal responsibilities. The question before the Committee is whether the revisions to A-76 achieve those goals?

To that, my short answer is that the revisions represent a significant and important step forward. They contain a number of important improvements to the process that do not bias the outcome in any way but which do enable agencies to conduct a more meaningful and effective competition. We compliment the former director of OMB, and OFPP Administrator Styles, for their work.

At the same time, there remain some very important areas in which improvement is still badly needed. The CAP report recognized the need for mid-course corrections and we hope that OMB will move quickly to address these remaining issues.

Expanding Best Value Authority

As you know, best value contracting offers the government the ability to consider both cost and quality factors in its sourcing decisions—which was also a specific and unanimous recommendation of the Commercial Activities Panel. Best value is not one strategy, it is an entire spectrum of strategies, including low cost/technically acceptable, that enables the matching of a specific acquisition strategy to a specific requirement. The best value spectrum recognizes that, particularly for relatively non-complex, low technology requirements, cost will dominate the government's source selection factors; for more complex high technology requirements, cost, while always a significant factor, is only one of the important evaluation factors to be considered by the agency. The best value process does not eliminate cost as a factor;

it simply recognizes that there are quality, technical, and other performance issues that must also be considered.

Until the A-76 revisions were released on May 29, about 98% of all government procurements had the authority to utilize the full range of best value strategies; only procurements conducted under A-76 were prohibited from exercising this common sense buying strategy. Thus, among the most important changes in the revisions to the OMB Circular is the creation of a modified form of "best value" contracting exclusively for public-private competitions. We applaud that. It is certainly a positive step.

However, even when the use of best value techniques are permitted under the new Circular, it stops well short of adopting the FAR process available for all other types of procurements. Under the Circular, when the "trade-off" process is utilized, cost must always represent at least 50% of the source selection evaluation criteria. In making source selections, particularly for requirements of some complexity, it is not at all uncommon to have five or six source selection criteria, of which cost is always one. In most cases, cost is the most important factor. But when there are several other factors to be considered, it is easy to conceive of circumstances in which cost, while clearly an important evaluation factor, does not make up 50% of the overall source selection criteria. By imposing this arbitrary 50% requirement, the administration is thus significantly limiting the ability of agency procurement professionals to make the right business decisions for the government.

We are disappointed that the revision stopped significantly short of explicitly adopting in full the Commercial Activities Panel's unanimously agreed to recommendation that best value techniques should be available to all agencies to use when they determine appropriate for a specific acquisition. We have learned the hard way that buying cheap is not always the smart way to buy. Under the new Circular, the authority for using best value techniques remains limited principally to information technology requirements, new work, or already contracted work. Why does the Administration's grant of authority stop there? It ought to be clear that there are many services that should not be bought based solely on lowest cost. Moreover, if all existing contracts (not just those limited to information technology) performed by the private sector can be competed under best value criteria, why does the same not apply to competitions for work currently performed by the government?

Interestingly, Section 812 of the Senate passed version of the FY 04 Defense Authorization bill, would allow the Department of Defense to make its competitive sourcing decisions in a public-private competition for the acquisition of information technology services on the basis of best value criteria. We recommend, in line with the recommendations of the Commercial Activities Panel, that the Department of Defense be authorized to evaluate all public-private competitions on any basis that is appropriate for achieving the requirement and that the use of best value not be limited to IT services. Consistent with the CAP recommendations, Congress should amend 10 USC 2462 (a) to permit DoD to conduct its A-76 competitions in the same manner as every other federal agency.

Best value is not new, it is well proven, and limiting its use for one subset of government procurement simply does not serve the government's best interests.

In addition, the House passed Defense Authorization bill prohibits DoD from initiating any competitive sourcing studies or conducting any competitions under any revisions to the OMB Circular, until 45 days after the Secretary of Defense submits a report to Congress on any impacts or effects of any revisions. The OMB Circular was issued after the bill passed the House, and the impact and effects of the OMB policy revisions as they affect all federal agencies are now clear, eliminating the need for a delay or any such report.

Cost Differential

The revisions also require that a 10% cost differential be added to the personnel costs of the non-incumbent bidders. By requiring this automatic application of the cost differential, particularly when coupled with the mandatory minimum 50% cost evaluation factor, we are concerned that the Circular falls well short of the goal of bringing real best value opportunities to even this subset of public/private competitions. In the end, the flexibility any smart buyer needs when making decisions about complex requirements will have been significantly and unnecessarily reduced.

Treatment of Bidders

The May 29 revision makes important improvements over the past Circular towards the goal of treating all public and private sector offerors alike. Under the old A-76 process, public and private bidders were treated very differently and subjected to very different source selection criteria. The revised A-76 requires all bidders, public or private, to respond to the same solicitation, submit their bids within the same timeframe, be evaluated on the same evaluation criteria, and enter into a binding agreement—either a contract for companies or a Letter of Obligation for government activities—under which performance will continually be monitored and the work appropriately subjected to continual competitive pressures. This entire set of changes reflects a very basic and critical commitment to fairness and to treating all bidders the same – and a good faith effort to implement the foundation principal of the CAP recommendations.

These changes should simplify the agency's independent evaluation process, speed up the entire acquisition process, minimize internal conflicts and enhance the competitive process.

Timelines for Completing Studies

Further, the revisions establish tough timelines for agencies to complete A-76 studies. Much has been said about the time limits in the Circular being overly burdensome. In practical terms, the Circular really provides up to 18 months for standard procurements from start to required completion. While this timetable may be aggressive, it does not seem to be overly egregious. It is important to note that the clock doesn't start ticking until the competition is announced. Much of the planning that used to take place after the announcement of an A-76 study is now to be completed prior to the agency announcement of a competition.

It is interesting to note that at DoD, the agency with by far the most experience with the prior A-76 process, the simpler and smaller single function studies have traditionally taken significantly longer—nearly 30 months on average. For their larger, more complex studies, the DoD average has been closer to 20 to 22 months. This suggests that the timelines in the Circular are reasonable. We also support establishing tough stretch goals for completing these competitions to minimize any uncertainty for the existing workforce, reduce bidding expenses for all participants, and facilitate the agency mission execution.

Streamlined Process

Another significant area of change in the revised A-76 is the new policy governing so-called "direct conversions" where work currently being performed by federal employees is competed only among private sector firms. The new Circular essentially eliminates direct conversions per se and puts in its place a logical set of requirements that enables agencies to utilize extensive market research, price analyses, and other tools, to include competition if they wish, for functions involving fewer than 65 employees.

On the face of it, it is difficult to argue with this new process. There are many effective tools available that enable agencies to make reasoned and thoughtful sourcing decisions on small sets of activities without going through the standard A-76 competitive process. Some federal employee organizations have already complained that the new process is nothing more than a license for agencies to find excuses to directly convert work. Ironically, similar concerns are raised by the private sector. We have seen scores of cases in which agencies have studiously sought to avoid utilizing the competition tool for making sourcing decisions.

As but one example, over the past three years the U.S. Navy has entirely cancelled 45% of all of its announced A-76 studies. Moreover, according to the Department of Defense, 49 of the 50 streamlined studies conducted at DoD between 1997 and 2001 under the prior A-76 process resulted in an in-house "win." That not only defies all odds but also represents a much more significant red flag for the contractor community than it should for the government employee unions.

In our view, the new "streamlined process" is not, in and of itself, the problem, despite our concerns that it could be used as an excuse to avoid competition. However, we believe that more guidance is needed regarding how this streamlined process will be monitored and evaluated, to ensure that it is not manipulated or used as a tool for inappropriate in-sourcing or outsourcing.

The streamlined process does contain a variety of certification and disclosure requirements. But the information now required to be included in the public record is insufficient and should be strengthened. In addition, the guidance given to agencies on the tools that are appropriate for making their strategic decisions is too general. For example, agencies should be reminded that conducting market research by using price lists such as those contained on the GSA schedules, while appropriate as a source of information, is not, itself, adequate since the prices contained on the schedules are initial prices that schedule holders may well reduce during the competitive process.

Contesting Decisions

The revision contains modest but significant changes to the process for administratively contesting decisions made throughout a public-private competition. Previously, the A-76 Circular contained its own appeal process that was separate from the administrative or agency level protest processes contained in the Federal Acquisition Regulation. To simplify matters, the Circular provides that the agency level protest procedures contained in FAR Part 33 is the only appeals process available to challenge an agency action. Further, the Circular explicitly authorizes appeals from only three parties, all of whom had similar appellant rights under the old A-76: the affected contractors, the government's "agency tender official," and the affected federal workforce, through its elected representative.

The significant question now being asked, and currently the subject of a June 13, 2003 General Accounting Office (GAO) request for public comment, is whether protest rights at the GAO -- beyond the agency appeal -- should be extended to the government or the federal workforce? More specifically, who qualifies under the Competition in Contracting Act's standard of "interested party" for GAO to accept a protest? As this Committee well knows, standing has been limited to those individuals with the authority to sign and certify a bid and to sign and be liable for performance under a contract.

PSC will be submitting extensive comments to GAO on this critically important issue. Under the new A-76 Circular, we think it is possible that GAO could determine that an agency tender official—the government official authorized to commit the government through its bid and to commit the government to performance as the signatory to the Letter of Obligation—qualifies for standing to protest before the GAO. For the most part, the revised A-76 places on this agency tender official the same rights and responsibilities as shouldered by all other bidders.

On the other hand, it is inconceivable to us that the GAO could rule that federal employees, either as individuals or through their elected representative, would be or should be granted such standing. While companies have the standing to protest, their workforce, be they individuals or their unions, do not have such standing. Although employees are clearly affected by decisions made in the course of a competition, they do not have the legal or financial liability for the bid submitted or for post-award performance. This is true of individuals and of unions, be they public or private.

The issue of whether to grant standing to an Agency Tender Official involves complex legal issues—including questions of how the government, in essence, can sue itself. We await GAO's opinions. By contrast, the issue of granting standing to individuals or unions, public or private, to protest before GAO or the courts is actually quite clear.

Additional Enhancements Needed

I would like to offer recommendations for further enhancements we believe need to be addressed quickly by OMB to make the A-76 process a process that really works for the government. I mentioned earlier the importance of providing more specific guidance on what is and is not

acceptable in the way of research and analysis for the streamlined decisions involving 65 or fewer FTE's.

Next, it is important that the A-76 costing methodologies be substantially revised. One of the unintentional ironies of the revised A-76 process is the requirement that the government conduct a cost realism analysis on both public and private bids. Indeed, private bids have always been subjected to a cost realism analysis, whereas government Most Efficient Organizations, or MEOs, under A-76, have been subjected to a much less rigorous cost analysis. At the same time, the A-76 cost manual is designed to create a model of a government Most Efficient Organization; and its use is required under the new A-76 process. However, there is a vast difference between a cost model and cost realism. A cost model reflects what things should cost; cost realism is geared toward what they actually will cost. While any cost discrepancies should emerge during post-award audits required under the Circular, the whole point of a cost realism analysis is to identify these dichotomies in advance. This is a continuing weakness of the A-76 process that must be addressed if we are to have a process that is fair to all and delivers the best outcomes for the government.

We are also concerned that even under the best value process provided for in the revised Circular, the past performance of only one party—the government—may not be considered. Congress and successive administrations have made clear their belief, one that we strongly share, that past performance is often the most important indicator of likely success or failure. It is appropriate that past performance must now be considered in virtually all government procurements. As a matter of policy in many agencies, past performance now accounts for at least 25% of the source selection factors for every private/private procurement. However, under the A-76 revision, the consideration of past performance for the government MEO is explicitly prohibited the first time around. This makes leveling the competitive playing field exceedingly difficult.

The Professional Services Council has long been one of the most outspoken supporters of using verifiable past performance in all procurements and we certainly would not advocate that past performance not be a factor in A-76 competitions. But if it is to be a significant factor for all but one bidder in the process, a real question of fairness emerges. Moreover, since it is widely accepted that past performance is a critically important indicator, the inability to consider it for any bidder does not serve the government's interests well.

The A-76 revisions deleted coverage of the large, complex web of activities known as Interagency Support Service Agreements, or ISSAs. These are agreements under which one agency provides services to another under a fee for service or reimbursable arrangement. In 1996, recognizing that there appeared to be an unconstrained growth in these completely non-competitive, often hidden agreements, OMB instituted a requirement that all new ISSAs be subjected to competition. In the OMB proposed revisions issued last November, that requirement was expanded to require that all ISSAs be competed.

We recognize that the requirement contained in the November proposal was non-executable and probably unnecessary. However, the final revisions to A-76 have eliminated completely any reference to ISSAs. As such, OMB has effectively rescinded the competition requirement

established in 1996. OMB has indicated that their decision to do so was driven primarily by the fact that no one has any idea of how many such interagency agreements exist, the costs associated with them, or the services they involve. While OMB stated its intent to address these agreements through a separate policy-making initiative, there seems to be no reason to not require that new ISSAs continue to be subjected to competition. To do otherwise is to enable the perpetuation of literally scores of activities that experience little or no oversight, remain largely hidden from public view, and may or may not be in the government's best interests. Thus, we recommend that, at a minimum, OMB reinstate the provision relative to competing new ISSAs, even as the broader policy-making initiative on ISSAs moves forward.

Finally, the revised A-76 requires that OMB approve any deviation from the Circular. This presumably includes waivers of public/private competitions for work currently being performed by government employees, although the Circular makes no mention of waivers at all.

In those cases where a public/private competition makes little or no sense—from the perspective of cost, technical skills, technology, mission, or the agency's ability to adequately support and reward a workforce—a waiver is the right answer. As PSC has previously recommended, in such cases, there should also be a requirement that the interests of the incumbent workforce be a significant source selection factor. As we have seen with the National Security Agency's Groundbreaker contract, the Army's Wholesale Logistics Modernization Initiative, and the Navy Marine Corps Intranet, to name a few, such a strategy can significantly advantage the incumbent workforce while also availing the government of high quality outcomes that might not have been otherwise possible.

For that reason, we believe the Circular should clearly articulate a policy permitting waivers in limited circumstances.

Conclusion

Mr. Chairman, we believe OMB has done a good job of making significant improvements to the A-76 process. One real measure of the success of their efforts will be the degree to which companies that previously would not participate in A-76 competitions decide to do so now. The number that were unwilling to participate, I should add, was growing, as the requirements being competed under A-76 grew more complex and the process continued on a downward spiral. Companies saw, for instance, that protests on A-76 competitions were sustained far more often than those under traditional procurements, a good indicator of the fact that the competitions were simply not being conducted properly, and a good argument in favor of conducting these competitions under the common language of the Federal Acquisition Regulation. In short, the old A-76 process, as the Commercial Activities Panel found, suffered from a terminal case of distrust; it simply had no credibility.

We hope that the revisions OMB has made to the process will help reverse that tide and will lead to robust participation and, even more importantly, to outcomes that are in the best interests of the government. After all, it is the interests of the government and the taxpayer that matter most. We believe that by addressing some of the remaining weaknesses of the process, OMB can help

make that goal a reality. We look forward to working with you, and with OMB, on the road forward.

Thank you for the opportunity to once again share with the Committee the views of the Professional Services Council. I would be happy to answer any questions you might have.

Mrs. JO ANN DAVIS OF VIRGINIA. I understand Ms. Kelley and Mr. Harnage have to leave at 11:45, so I'm going to begin with the gentleman from Tennessee. Mr. Cooper, do you have any questions?

Mr. COOPER. Thank you, Madam Chair.

To an outsider, the inherently governmental distinction looks pretty confusing and arbitrary; and I almost wonder if it wouldn't be simpler just to say that you could privatize pretty much whatever any private company wanted to bid on. Because the standards seem to shift over time; and it's hard for me to see, as an outsider, a clear dividing line. Are there clear dividing lines, especially when you're talking about narrowing the standard?

Ms. KELLEY. I believe there are very specific lines. Part of the problem now is that there's an area of work I think most people would agree is inherently governmental, there is an area that everyone would agree may be designated commercial appropriate, and then there's this gray area. In NTEU's view, the A–76 rewrite has increased the number of jobs that will be moved to commercial and I think ill-advisedly. Some could argue that it also widens the area of the gray designation because NTEU would believe those in the gray area are inherently governmental, and others I'm sure on the panel would think those in the gray area should be commercial. But I think there are definitely jobs in the Federal sector that should be done only by government employees; and there is disagreement today over what that definition is.

Mr. SOLOWAY. Mr. Cooper, the question is a good one, and I agree with Colleen's point that there are clearly positions that must be performed by Federal employees. OMB policy letter 92–1, which was issued in 1992, lays out a pretty good framework for what that is and what those jobs are.

Very often, what happens in this debate though, is we move away from understanding what the functions really are. The example I'll use is the recent amendment that was considered in the Senate relative to air traffic control. I may or may not agree, but one could argue that air traffic controllers themselves, given the role they play, are inherently governmental. Some people believe that, and, as I said, I am not going to debate that point.

But what that amendment encompassed was virtually all of the support underneath air traffic control—the technical support, the systems and so forth—that support activity is not in and of itself, in our view, inherently governmental. In fact, most of the technology supporting that is commercially driven. That was why FAA was given special authority a number of years ago to change its procurement practices, because it was having trouble accessing commercial technology.

So you have to be very careful when you talk about a tax collection function being inherently governmental. There are elements and pieces to it. One piece may be inherently governmental, and another piece may not.

Mr. Tierney, to the question you asked earlier about giving discretion to government managers and government employees to make these decisions, I think it's inevitable you have to give some of that discretion and have some faith that government employees

and government managers will show good sense in making those distinctions that need to be made.

Mr. COOPER. It's sounding again like it's whatever private companies may want to bid on. I would, for example, have thought that military service would be an inherently governmental function, not Civil Service, but, if the Pentagon is requesting $200 million so that they can essentially train foreign troops to preserve peacekeeping and other functions that ordinarily our troops would perform.

So it is amazing, the reach of these definitions. And I agree that's not Civil Service, but it is a change in what an ordinary American would have thought.

I am worried about the inherent disadvantage. As I understand it, there is an automatic 12 percent overhead rate applied to any in-house bid, at least within DOD; and that seems like an arbitrary and unfair number. Why is 12 percent automatically the overhead rate that's applied?

Mr. SOLOWAY. To deal with the overhead issue one has to go back to the history of the Circular a little bit. If you will bear with me, back during the early to mid-1990's OMB was looking at this very issue of overhead and how overhead was being accounted for on the public side. Obviously, in a private sector bid you have to account for all of it in your bids; and OMB found that the average overhead, and this was particularly at DOD because that was the only place that A–76 competitions were taking place, that the average factor being figured in was somewhere between 1.5 and 2.5 percent. Anybody who's ever run a business or an organization knows that when you're running an organization 1.5 or 2.5 percent overhead is a bit beyond the pale and virtually impossible.

So OMB went to DOD and then asked a number of folks in industry using the government definition of overhead, because it is different for a government organization than it is for a company, what should this number be. There were a variety of inputs brought to OMB's attention, ranging from the low single digits, which I don't think many business people would agree is realistic, to more robust numbers in the mid 20 percent range.

Many company overhead factors are 25, 30, 35 percent, even good companies. It is a reality of doing business, and to think that you can operate a government entity at a 1.5 or 2 percent overhead is clearly not accurate. But because of the way the budget and costing models work and systems work in government, you don't have full accounting for your total overhead. You don't really know what all of those different lines of cost are.

So OMB actually came up with a compromise at 12 percent. It's not an arbitrary number. Is it absolutely right? It's probably too low, in my view. But it's there to be a reasonable estimate of what those costs are because we don't have the financial systems to give an accurate presentation and, we have a history where the numbers being used were absurdly low.

Mr. HARNAGE. Mr. Cooper, I would like to respond to that, too, if I may.

You know, it is an arbitrary number, even for DOD; and if you read the Department of Defense Inspector General, the 12 percent overhead rate he states is "unsupportable, a major cost issue that

can affect numerous competitive sourcing decisions. Unless a supportable rate is developed or an alternative method is calculated at a fair and reasonable rate, the results of future competition will be questionable." The Inspector General of DOD says this is an arbitrary number and it's not supportable.

Mrs. JO ANN DAVIS OF VIRGINIA. The gentleman's time has expired.

The gentleman from Maryland, Mr. Ruppersberger.

Mr. RUPPERSBERGER. Yes. Really, this was a question that I probably should have asked for the first panel, but I am going to throw it out, and if you don't want to answer that's fine.

Setting aside whether or not the idea of outsourcing to the private sector is a good idea for a minute, I would like to ask a question about the A–76 process and the intent behind the process. The contracts from this process tend to be large-dollar-volume contracts which essentially cut small businesses out of the bidding process; and these contracts may be $30 to $50 million annually and inherently are set up—in my opinion, they're set up for large businesses.

In my Maryland 2nd Congressional District, Fort Meade, which is an Army base, has been outsourcing much of its work to small businesses; and, as a result of these changes, those small businesses in my district are telling me that they no longer are able to compete because—with the large businesses. So my question really is, what is being done to ensure that the small businesses won't be pushed out of the process and how can we be sure that small businesses' percentages are built into contracts or actually fulfilled?

Mr. DILKS. I would like to respond to that, Mr. Ruppersberger.

Mr. RUPPERSBERGER. Sure.

Mr. DILKS. Having been a small business——

Mr. RUPPERSBERGER. I wanted to ask the question of the Department of Defense, but that's fine.

Mr. DILKS. Well, I can tell you one of the major reasons we have not seen a lot of small business participation in the A–76 studies in the past is because the process is never ending. In my view the timeframe change that is now part of the new Circular will see a significant improvement in the participation of small businesses, because now not only do they view the playing field as being more level, they view that their investment and bid and proposal cost, which is very limited in the small business, will see a more immediate return. So I think this revised Circular will benefit the small businesses in many ways.

Mr. RUPPSERSBERGER. Why do you think they would be concerned or complaining then? We are getting some calls from the small businesses that really deal with that Army base. Why would they have concern? Do you have an idea?

Mr. DILKS. I really—in my view—I mean, small businesses have always had an opportunity to team up with other companies on large procurements.

Mr. RUPPERSBERGER. Well, it's usually as a subcontractor.

Yes.

Mr. SOLOWAY. I think there is another point here. I think Don's point about the timeframes being a real disadvantage to small

business historically and the nature of the process has caused a lot of small businesses to stay out of the process.

On the other hand, and DOD has some very good numbers on this. It would be worth asking them for them. There is a very substantial percentage of A–76 competitions in the past that have gone to small business. I think the revision—one of the ironic and probably unintended consequences of it is it will harm small business. To the extent that direct conversions are now eliminated entirely and for under 65 employees, which is principally the area that small businesses can be competitive, you can no longer do a direct conversion and you're back into the public-private competition environment. That was an area in the old Circular where I believe it was under 50 or 60 employees you could actually have a robust private sector competition. It was an area where small business participated very extensively. You get up into the 100, 150, 200 employee range, obviously it becomes much more difficult for a small business.

So one of the difficulties with the new Circular is in the push to guarantee that we are always going to have public-private competition, even where it doesn't necessarily make sense. We are disadvantaging small business by eliminating that category that they're most competitive in.

Mr. RUPPERSBERGER. OK. Thanks.

Chairman TOM DAVIS. Thank you.

Let me just ask—I know you have to go. Can I just ask a couple of questions of you?

Let me—Mr. Harnage and Mrs. Kelley, thanks a lot for being here, because I think you have more members that could be adversely affected by this than anyone else. I appreciate your being here, and I just want to tell you we have great sensitivity. Is this a better Circular than the old Circular?

Ms. KELLEY. Not in NTEU's view, no. We believe that the problems I identified in my testimony make it worse, and we are asking that this committee block implementation of the new A–76 and go back to the old unless these issues are addressed.

Chairman TOM DAVIS. Because the old one was horrendous, too. We agree with that, don't we?

Mr. HARNAGE. I don't believe it's better. One of the things that amazes me the most is the practical—for all practical purposes, the elimination of most efficient organization. For years we've pushed the privatization issue on the basis that competition saves money; and in this morning's testimony, there was some reference to a 20 to 30 percent savings. That's only—the 30 percent is only in the case of it being privatized, 20 percent of the competition.

That's the reason AFGE has supported competition throughout these years. But if you eliminate the MEO, you're eliminating that 20 percent savings. So why would you eliminate that?

I know the contractor community thinks it's only fair that they compete against what you're doing today. But we recognize there efficiencies in government. Why should we privatize those inefficiencies, then let the contractor eliminate them and have a windfall profit at the taxpayers' expense? It makes absolutely no sense.

You know, there are several issues in this that, as I said in my opening statement, you know, this is driven. This is a political

agenda. It's not about saving money. It's about moving money to the private sector. There is nothing in this A–76 that gives us any more accountability, and we have been trying to get that accountability now for years, where we have projected these savings. Let's go back and determine whether or not we did, in fact, save those; and, if we didn't, let's don't repeat that mistake.

Chairman TOM DAVIS. Well, let me tell you my agenda. And, again, it's not a political agenda. It's one that wants to bring more efficiency to government, and competitive sourcing I think helps the government come in and do their job better. I think we all agree that's a very positive thing.

I expressed concern earlier that one of my concerns is when you do this on a repetitive basis you kind of wear down the Federal work force and people just kind of hang it up and say, you know, I don't have the job stability here I was getting for some of the reduced benefits or whatever. And that's an issue as well. Now, both the NTEU and the AFGE were included in the Commercial Activities Panel and agreed with the sourcing principles that developed. What's the primary differences between those principles and the updated Circular? Could you characterize that quickly, the differences?

Ms. KELLEY. Well, while I supported the principles, I did not submit or support the underlying recommendations, one of which was the one-step approach, which is being called tradeoff or best value.

Also, one of the things that I did support was the concept of the high-performing organizations so that the Federal agencies were encouraged and supported and funded to create these high-performing organizations, and there's nothing in the new Circular that does that. That piece of it is totally eliminated.

Chairman TOM DAVIS. For both of you, that's just a huge issue, is that fair to say?

Mr. HARNAGE. That's a very large issue. Even though it was a unanimous decision on the principles, on the report itself, the supermajority was all of the appointees of the administration and the contractor community, none of the academians or the——

Chairman TOM DAVIS. Well the devil's always in the details, I think.

Mr. HARNAGE. Yes. But, you know, what it looks like to me is they picked out the part that—not only that the Commercial Activities Panel rejected, they put into this new A–76, but they picked out the parts that most favored the contractors in the recommendations and left out those that most favored the taxpayers and the Federal employees. You know, this package is totally objectionable. They could have done a much better job had it been less influenced.

Chairman TOM DAVIS. I don't know if you have done this, but I would ask each of you, as you look at that current thing, if you want to come back with some specific recommendations as to how you would write it that would be helpful to us, just so we could get it and compare.

Mr. HARNAGE. I'd be glad to do that. My question is, Mr. Chairman, is I'm more than willing to do that, but I'm a little confused. What is the intent of this committee and handling this information?

Chairman TOM DAVIS. Well, we're an oversight committee. We can also legislate. I mean, we have authority. The legislative process is a very burdensome process, as you know, because we would have to not only move a bill through, we have to get it signed into law. I don't think there is a reason to be real optimistic about that from where you sit, given the current alignments; and I'm just being candid. However, I think we can influence the regulatory process.

Mr. HARNAGE. We've had that conversation before.

Chairman TOM DAVIS. We can influence it in a fairly significant way, and I am happy to do that. And if it means legislation—but I want to just get a fair understanding of everything. Because I don't think there is any question competitive sourcing is a management tool that should be utilized and can be utilized and has been helpful in many instances.

You know, I'm trying to be sensitive to do this in an appropriate way; and I think in many ways—I mean, I think Ms. Styles has taken a good stab at it. I'm just—we sit here, and we would hope to have more consensus, and when you don't get consensus on an issue like this, it causes me some concern.

We have a vote on. I have more questions. I know you two have to leave, am I correct? Both of you? Are there any other questions at this point? Mr. Tierney. Let me give Mr. Tierney a couple of questions for you. Then if you can wait I would like to come back and ask you some questions after the vote, and we can have more of a conversation, if that's OK. Mr. Tierney.

Mr. TIERNEY. Thank you, Mr. Chairman.

I want to thank all the witnesses for being here, being helpful.

I don't want to hold you up, Mr. Harnage and Ms. Kelley, but, I mean, I have obvious concerns about this.

We want any process to be fair. I think it has been remarkable that both the organized labor as well as the business community have wanted to move this process forward, but I have questions about the details. For it to be fair, it can't be arbitrary; and for there to be a lack of arbitrariness you have to take out some of the subjective aspects of it.

I keep looking at the current proposal and just see a lot of subjectivity all the way around, and that causes me great alarm and great concern. We have, I think, an abominable record of supervising contractors, private contractors—the Department of Energy, the Environmental Protection Agency and on down the line. So extending out to more private contractors without first improving our ability to supervise them should be a concern to us.

Let me talk about this best value. That seems to be the most subjective of all of the aspects on this. Mr. Harnage, Ms. Kelley, do you have concerns about that? What are they and how do we address them?

Mr. HARNAGE. The best value?

Mr. TIERNEY. The best value.

Mr. HARNAGE. Yes, I do have, because it's such a subjective decision.

Under the old 76, if the statement of work requested a certain, you know, job be done and the contractor was competing for that, the contractor could go to the contracting officer and say, I know

you asked for A, but I would like to provide you B. It is a little more costly, but it is a better product, be more efficient, so it would be a savings in the long run.

The government official could say, I like that, then would go back to the in-house and say, can you do this, and if you can, what would it cost?

You're looking after the taxpayer. You're keeping apples to apples, not apples to oranges.

Under this new situation, the government official can say, I like that. You've got it. Not necessarily a savings to the taxpayer and not necessary bells and whistles that you really need, but that individual likes it. And with this conflict of interest, this revolving door that we have, particularly in DOD, that's extremely dangerous.

Mr. TIERNEY. Ms. Kelley.

Ms. KELLEY. I would also add that Federal employees have many ideas on how to do things better. They have a lot of ideas that are innovative and creative, but most agencies don't have systems, a process funding, or management structures in place to support that innovation and creativity from ever being put to work or ever being funded and allowed to actually put forth these new ideas. So, in that instance, I think that the agency should be not only encouraged but supported and funded to be able to do that.

On the issue that you mentioned, also, Mr. Tierney, about the accountability issue of the contract management, this new rewrite, OMB suggests and requires, I guess directs each agency to create a program office to monitor or to implement the competitive sourcing agenda. I wish they had directed each agency to put in place a program office that would monitor and hold accountable all of the contracts that are out there so that real decisions can be made about whether that work can and should be done by Federal employees or by contractors and when it should be brought back inside. There is no such system in place that mandates or requires that; and, as we have heard from GAO and others, most agencies just don't do it.

Mr. TIERNEY. I have limited time, so I want to just cover one other thing, Mr. Harnage, that you mentioned in some of your summary, was the adverse impact you believed would be the very diversity in the Federal work force. Would you just expand on that comment?

Mr. HARNAGE. Well, except, you know, in most cases the privatization—the vast majority of the privatization that has taken place, driven by either the quotas or the A–76, has most impact on minorities—minorities and women. That's where that comes from. If you look at the Federal work force and the people that are affected and the ones that wind up leaving, as opposed to those staying, it has a larger impact on the minority community.

Mr. TIERNEY. Mr. Dilks, you mention in your remarks that you thought it would be fair to treat the public like the private in terms of these bids. But I have some concerns about the fact that the contractors don't seem to be being held to absolute competition requirements for requiring and retaining existing work. Would you be amenable to having those—the A–76 changed to make sure the contractors as well as public employees were held to recompetition requirements?

Mr. DILKS. We are held to recompetitions. Our contracts are recompeted at the end of their terms. That's been the process as long as I have been in the business. We're already held to that.

Mr. TIERNEY. I read these to back off of that a little bit. You don't read that at all.

Mr. DILKS. No, sir, not at all.

Mr. TIERNEY. Well, we'll go back and read it again.

Ms. KELLEY. If I could just——

Mr. TIERNEY. Sure.

Ms. KELLEY. And this is really a question, I guess, to clarify my understanding. Any recompetition occurs private to private. Federal employees never have the opportunity again to be in that process.

Mr. DILKS. Is that your question?

Mr. TIERNEY. That's what I meant by backing off. Thank you for translating it for me.

Mr. DILKS. I am not speaking for my members, but, speaking for my own company, I have no problem with recompetition of work that's been contracted to me.

Mr. TIERNEY. Of course, the problem with that is, once you're in there, the employees are gone and who actually puts together that bid then becomes a problem. We'll have to work out some structure on that. Because, otherwise, once it's out the door, it's out the door; and if we are losing money and it's not working well, we are sort of in tough shape with that situation.

Mr. SOLOWAY. That's at the point when you recompete it amongst other companies. That's the same decision process a company goes through.

Mr. TIERNEY. That's where we are. If there isn't a job that's needs to be done well by private, we've just lost the public aspect of it and we're done. As much as I think that there are appropriate situations, I think there are some inappropriate situations; and if you move to one of those and you don't have any way to recover, you're in deep soup. That's the problem there, is once you're out the door to private contractors for up to 5 years or whatever and then you want to rebid, if it's only contractor to contractor you've lost the opportunity to have what might be the better process on that.

I yield back the balance of my time.

Chairman TOM DAVIS. Thank you very much. I just have a few more questions.

Mr. HARNAGE. Mr. Chairman, if I might.

Chairman TOM DAVIS. Yes, you're dismissed.

Mr. HARNAGE. I just wanted to say thank you very much for this opportunity. I apologize for having to leave. We will get you that information you requested, and I'll be more than glad to meet with any member of the committee that might like to meet personally.

Chairman TOM DAVIS. Thank you.

Let me ask, we don't—we recessed. I heard the bells go off. The new Circular permits interested parties, including employee representatives, to appeal adverse A–76 decisions to the contracting agency, but the Circular doesn't address the issue of the standing of Federal employees to protest before the GAO or the Federal courts. What is your view on whether the Federal employees themselves should have standing to challenge A–76 determination?

Mr. SOLOWAY. First of all, Mr. Chairman, the Circular can't address that issue because it's not within the purview of an administrative policy. It's actually a legal question and would probably require statutory changes. So I don't believe the Circular even can address the protest at GAO that's actually GAO's discretion as to who they grant standing to.

But, as I said in my testimony, the issue that really has to be examined here is who has standing before GAO or the courts. That standing is derived from the Competition in Contracting Act and has traditionally, for good reason, been limited to those who have the authority to sign and certify to a bid and to have the liability legally and financially for performance under a contract.

In the case of Don Dilk's company, Don Dilks as the CEO of his company has standing under that standard. His employees and his unions do not have standing because they don't have that liability and that responsibility.

In the case of the revised Circular, as I said in my testimony, I think it's conceivable that GAO will for the first time determine that the government is actually being asked to behave like a bidder. There is an official with authority and certification responsibility; and, therefore, that official and the government agency may then get standing at GAO, but this is up to GAO.

However, to extend that beyond the agency tender official to either the union or to individuals would be, as a matter of equity and law, totally inconceivable. It's entirely contrary to the whole concept of standing and the whole purpose of the protest process.

Chairman TOM DAVIS. Mr. Dilks and Mr. Soloway, what really influences a company's decision to engage in competition? Because there's a cost to that. When you go after one of these, there is a cost. You have to, you know, put forward your proposal and the like. Does the revised process encourage companies? Is this more of an incentive for you to get involved?

Mr. DILKS. Mr. Chairman, it will be for our company. There are many factors, obviously, in determining when we are going to bid on competitive procurement. The most important one, in many cases, for my firm is what is the likelihood that we can be successful on the competition and provide high—as high or higher quality of work than any of our competition. That's usually the driving factor. And part of that factor is can we win the competition.

In the past, quite honestly, my company has always put A–76 competitions at the very bottom of the level of priorities because of the fact that there's never any certainty that there will ever, in fact, be an award. With this revised Circular I think that for the first time we have a real fair playing field, and I will be much more interested in pursuing those opportunities where they might exist.

Mr. SOLOWAY. Mr. Chairman, I can't speak for a company, but I can tell you that the jury is still out on the question, and there are a couple of key issues that play into this. No. 1 is the limited application of best value. Despite Mr. Harnage's comments to the contrary, best value really is where cost and quality come together; and throughout the Federal procurement system cost and quality has become, by the dictate of this committee and others in Congress, sort of the standard by which we want to buy products and services. The limited application of best value, particularly as you

move into more sophisticated technology requirements, really becomes an issue for companies to look at whether or not they can propose the kinds of innovative solutions that can be successful.

So I think that the jury is still out on the whole question. I think it is clearly an improvement. The question is whether we have gone far enough and there are a number of other issues that need to be addressed.

Chairman TOM DAVIS. How often do Federal employees that are displaced end up with a contractor after an A–76?

Mr. SOLOWAY. Historically, it's been, a very high percentage. The last numbers I saw were somewhere about 60 percent or so. As Scott Cameron said on the earlier panel, in Interior's experience they have not had a single employee who has been involuntarily separated as a result of the process.

One of the weaknesses of the process, ironically, to turn the question a little bit, is that in the push to mandate public-private competition and to not lay out and articulate a process for waivers we're avoiding or skirting opportunities to actually advantage the employees through competitive outsourcing while still advantaging the government.

The examples I'd suggest the committee look at are the National Security Agency's Groundbreaker contract and the Army's Wholesale Logistics Modernization initiative. In both of those cases, the interest of the employees was first and foremost in the source selection. In neither of those cases was A–76 conducted. The employees were made a major asset in the process; and the companies were basically told, if you want to do this business for us, you've got to think about our employees and tell us what you're going to do to make them whole and take care of them. And the results were extraordinary.

You can't do that when you're competing against that employee base, for obvious business reasons. But in many cases where the A–76 competition makes no sense, those are options that we ought to be looking at if our principal concern is the employees.

Chairman TOM DAVIS. OK. Mr. Soloway, you testified that you have concerns with Federal employee groups being exempt from having past performance used as a selection criteria in the first round of A–76 competition. How would you measure a Federal employee's past performance? How does the government assess its own past performance?

Mr. SOLOWAY. It's a very difficult question and I raised it in the testimony because I think it's one of the areas we're going to have to be very cognizant of as we go forward.

It is by a matter of policy, in many cases, practiced throughout the government that past performance is sometimes 25, 30, 40 percent, even 50 percent of a source selection decision for very good reason. As this committee has said over the years, it's often the best indicator of success or failure in the future. So to eliminate only one party from being considered under their past performance makes it very difficult to have a true best value level playing field.

I think the government needs to develop an internal system for measuring activity level performance, not just agencywide report cards, something beyond ad hoc reference checks and phone calls, to actually build a performance data base. Now, that's going to take

some time. The second time around, if an MEO does win an A–76 competition, their past performance should be easily measured. It should be tied to their binding letter of obligation, the performance requirements, the cost associated with it and so forth. But I think it is a very difficult question.

There are various things you can do to look at performance. You can look at cost growth over time. It's a little bit different than you do with the private sector because we now have a system in place across the government to measure the performance and maintain a data base. But it is a real equity issue. It is also an issue for agencies when they are looking to likely success or failure.

Chairman TOM DAVIS. Let me ask each this. I mean, we go through government periodically and reassess can the government do this better on the outside. Should the government have a program where contracts that are on the outside—every once in a while to go reassess those and see if they'd be better off taking them in-house?

Mr. SOLOWAY. There is certainly nothing in the Circular that would inhibit or prohibit that. That has always been the case under the old Circular and the new Circular. It's called a reverse A–76, and the rule just turns around the other way in terms of the cost differentials and so forth.

Chairman TOM DAVIS. In your experience, has that been utilized very much?

Mr. SOLOWAY. It's been done. It's not common, but it's been done.

And the point that Mr. Tierney was making is a fair one. In your days in the private sector if you decided to outsource something and you eliminated the infrastructure that supported that activity and the outsourcing didn't work, your first and most common remedy would be to go recompete it amongst other providers. If at the end of that process you really couldn't find a provider that was going to provide the quality and cost that you really needed, then you go through the process of recreating the infrastructure. That limitation is principally driven by arbitrary FTE ceilings, and I don't think those ceilings ought to be in place to limit your ability to do that.

One good example of this—and we dealt with this during the Commercial Activities Panel—was Indianapolis where, as you know, Mayor Goldsmith was very active in competitive sourcing.

First of all, he actually had strong support from the unions there to do a competitive process. Not everything was competed. There were decisions made that some things just made no sense to be performed by the private sector and other things made no sense for the government to continue to perform for various reasons. They did find on rare occasions that in some cases the market essentially disappeared for the service they were buying.

The example he uses very often is pothole filling. If you take a city the size of Indianapolis and you contract out the city's need for potholes and filling potholes, you have pretty much taken away much of the marketplace because it's a dominant piece of business in the city. After a number of years they found that the performance was not up to snuff and so they worked with their unions to build a competitive bid and bring the work back in-house. It's uncommon. It's driven primarily by radical changes in the mission or

the marketplace. But if it's commercial in nature and you've already made the decision that the performance by the government or the private sector is not the critical decision, it's the best source, you continually use that competitive marketplace to find a better supplier.

Chairman TOM DAVIS. What we found in Fairfax on trash collection is that, first, it was all outsourced. After a while we got the county to also do a piece of it, and in the outsourced areas the costs dropped because the county, by doing a critical piece of it, brought some additional competition. We found basically, some price rigging and so on among everybody prior to that as they were divvying up the territories and the like so——

Mr. SOLOWAY. As you said, in the case where the market has changed and competition doesn't really exist, it can be helpful. But in most cases the market is quite robust and just adding a government bidder to the process doesn't create the competition. It's whether the competition is either there or it isn't.

Mr. DILKS. Mr. Chairman, if I can add to Stan's comments, you also need to understand in the service contracting business we're challenged by our agencies, our customers every day to find less expensive and better ways to perform, so it's an ongoing process. In the services business truly you're measured every day based on your level of service and your cost. So this isn't something that comes up every time the contract's up for recompete. This is part of our everyday work performance.

Chairman TOM DAVIS. OK. Well, those are the questions I have. Anything else you all would like to add? Probably. But your total statements are in the record.

I appreciate your being here. I appreciate both of our panels coming here this morning and answering questions. I want to thank our staff who worked on this hearing as well.

So the hearing is adjourned.

[Whereupon, at 12:15 p.m., the committee was adjourned.]

[Additional information submitted for the hearing record follows:]

United States Department of the Interior
Departmental Council on Labor-Management Cooperation

RESOLUTION

On this 17th day of January, 2002, we, members of the Departmental Council on Labor-Management Cooperation (DCLMC), do hereby adopt the following principles:

In keeping with the Secretary's "Four C's", to encourage local management to cooperate, consult and regularly communicate with local union representatives on issues related to the competitive sourcing initiative in a timely manner and as appropriate, to the extent that the exchange of information is within the confines of the rules governing the acquisition process.

To encourage local union and management representatives to work together so as to facilitate a better competitive sourcing process, and to ensure employee rights are protected throughout this process.

To support the goal of the Secretary and the Department to find and implement the best, most cost-effective ways to provide quality products and services to our customers.

To support the Secretary's vision for the Department to be a responsive, dynamic, and relevant government agency which serves its citizens and focuses its attention on citizen-centered governance.

Bob Doyle, AS-LM

Olivia Ferriter, AS-WS

RoseMerida Lucero, NFFE-BLM

John Combs, DOI LMR

John McDonald, IEF-BIA

J. Lynn Smith, AS-FWP

Terry Steele, AS-IA

Mike Trujillo, AS-PMB

NTEU
The National Treasury Employees Union

July 1, 2003

The Honorable Tom Davis
Chairman
Committee on Government Reform
2157 Rayburn House Office Building
Washington, DC 20515-6143

Dear Chairman Davis:

Thank you for giving me an opportunity to testify at the hearing your committee held on June 26th. I hope you will agree with me that the hearing demonstrated there is no consensus on how the Office of Management and Budget's (OMB) rewrite of the A-76 Circular will benefit federal employees and the delivery of government services to the taxpayers.

During the hearing, you asked me to send recommendations for how to improve A-76. I have enclosed three documents, which I believe will provide you with a good overview of NTEU's concerns about the new A-76 and suggestions for policy changes. I believe our suggestions will help level the playing field for federal employees and ensure the best value for the taxpayers.

Attached are:

(1) A copy of my written testimony from the hearing on June 26th;
(2) A copy of the comments NTEU submitted to OMB on December 19, 2002, in response to the draft revisions to A-76; and
(3) A copy of the CORE Proposal, a package of changes I advocated before the Commercial Activities Panel.

I hope this information is helpful, and I would welcome the opportunity to discuss with you in greater detail the changes in government sourcing policy NTEU is advocating.

Sincerely,

Colleen M. Kelley
National President

Attachments

cc: Henry Waxman, Ranking Member

1750 H Street, N.W. • Washington, D.C. 20006 • (202) 572-5500

National Treasury Employees Union

Testimony
Of
Colleen M. Kelley
National President
National Treasury Employees Union

"NTEU Views on Flawed A-76 Revisions"

June 26, 2003

Committee on Government Reform
2154 Rayburn House Office Building

Chairman Davis, Ranking Member Waxman, and other distinguished Members of this committee, my name is Colleen Kelley and I am the National President of the National Treasury Employees Union (NTEU). I was one of the twelve members of the Commercial Activities Panel (CAP). NTEU represents 150, 000 federal employees in 29 federal agencies and departments. I appreciate you giving me the opportunity to share the views of frontline federal employees on the Office of Management and Budget (OMB) rewrite of the A-76 outsourcing rules, and how the new A-76 will affect the Administration's privatization initiatives.

Let me be very clear: NTEU strongly opposes OMB's quota-driven campaign to privatize more than 850,000 federal employee jobs. OMB's rewrite of A-76 gives agencies even greater flexibility to turn the work of the federal government over to private contractors. I caution committee members not to be misled by OMB rhetoric that this new A-76 Circular will improve the use of public-private competitions. Instead, the new A-76 Circular is designed to give OMB one more tool to contract out as many federal employee jobs as quickly as possible. While the old A-76 Circular was not perfect, the revisions are unfair to federal employees, and will result in contractor services at higher costs and lower value to the taxpayers.

Opening Up Inherently Governmental Jobs to Contractors

Under the A-76 revisions, more federal jobs will be put up for grabs to the private sector, since OMB's sweeping changes expand the number of federal employee jobs eligible for privatization. Last week, NTEU filed a lawsuit in federal court alleging that OMB's revisions to A-76 are illegal. NTEU believes that OMB has illegally trumped Congress on the sensitive issue of determining whether a function is "so intimately related to the public interest as to require performance by federal government employees." In the lawsuit, we point out that the A-76 revisions require federal agencies to apply a substantially narrower definition of inherently governmental functions than is now contained in federal law. Under the Federal Activities Inventory Reform (FAIR) Act of 1998, activities that are inherently governmental may only be performed by federal employees, while those activities designated as "commercial" may be contracted to the private sector.

The FAIR Act requires the exercise of "discretion" for a function to be deemed inherently governmental. The revised Circular A-76, on the other hand, rules out as inherently governmental all functions that do not require the exercise of "substantial" discretion – a significant difference in language.

Moreover, functions involving the collection, control or disbursement of federal funds, which have been deemed inherently governmental under the FAIR Act and well before the FAIR Act, may obtain that designation under the new circular only if they include the authority "to establish policies and procedures."

These sweeping changes would have a substantial adverse impact on large numbers of federal employees, including thousands of NTEU-represented employees who are engaged in the collection, control or disbursement of appropriated or other federal funds, even though they may not be responsible for "establishing policies or procedures." For example, as a result of OMB's unilateral expansion of the definition of "commercial in nature," we have already heard from the

IRS that their FAIR Act inventory of federal jobs eligible for privatization will nearly double next year.

In conjunction with narrowing the inherently governmental definition, OMB also has restricted the rights of unions and other interested parties to challenge improper agency designations of functions as "commercial." The circular replaces the FAIR Act's broad right to pursue such "challenges" with a one-shot opportunity to file a challenge only if and when an agency changes the function's classification. This, too, runs afoul of the FAIR Act.

Ensuring that inherently governmental functions are performed by federal employees only is firmly rooted in sound government policies, such as ensuring that confidential taxpayer information is safeguarded and that the government maintains needed expertise at all times. I urge this committee to seek to uphold the long held definition of inherently governmental.

NTEU has several other concerns with the A-76 revisions. In response to OMB's initial proposed revisions to Circular A-76, NTEU submitted detailed comments describing how the new provisions were unfair to federal employees and would deprive taxpayers of the benefits of true public-private competition. Unfortunately, the final version of the Circular remains heavily slanted in favor of private contractors over federal employees, and will deprive taxpayers of the benefits of fair competition.

Lack of Accountability from Contractors

The revisions to A-76 will move even more federal jobs to the private sector, yet the revisions would not make one single meaningful change to improve oversight of contractors and better track their performance. Oversight is particularly important now, as the Administration requires that more and more government functions be opened to contractors. The revised Circular continues to fail in effectively holding contractors accountable for their costs and performance. The Circular endorses the status quo of asking agencies to monitor the work of contractors, without having given these agencies any additional resources to better track their work.

The revised Circular requires agencies to redouble their time and resources to produce inventories of the size and makeup of the entire federal workforce, including those performing both commercial and inherently governmental functions, yet it fails to require agencies to implement systems to track whether current contracting efforts are in the best interests of the taxpayers. The new A-76 continues to disregard the need for agencies to determine how much the contractors' work costs the taxpayers, how the actual costs of the contract compare to what the contractors originally promised, whether the contractors are delivering the services they promised to deliver within the timeframes they promised, and whether the services are being delivered at an acceptable level of quality. When a contractor is not living up to its end of the deal, the government must have the realistic capability to bring the work back in-house. The government owes this accountability to the taxpayers who fund it. Agencies and the taxpayers did not know this information before the revised A-76 was released, and they would still be in the dark now.

Once a contractor gets a contract, that work is out the door and rarely--if ever--scrutinized again. For example, Mellon Bank, a contractor hired by the IRS as part of its "lockbox program," lost, shredded, or removed 70,000 taxpayer checks worth $1.2 billion in revenues for the U.S. Treasury. In January of this year, GAO issued a report (GAO-03-299) criticizing the inadequate oversight of Mellon Bank. Among other things, GAO found that:

(1) "Oversight of lockbox banks was not fully effective for fiscal year 2002 to ensure that taxpayer data and receipts were adequately safeguarded and properly processed. The weaknesses in oversight resulted largely from key oversight functions not being performed" (p.3)

(2) "Tax receipts and data were unnecessarily exposed to an increased risk of theft." (p. 21)

(3) Contract "employees were given access to taxpayer data and receipts before bank management received results of their FBI fingerprint checks." (p.29)

Another example of poor agency management of contractors came to light recently when a contractor hired by the IRS and other federal agencies to provide bomb detection dogs and services to patrol the perimeters at several federal facilities, including the IRS Service Center in Fresno, was convicted after he lied about the qualifications of his dogs, then faked the dogs' certifications to keep his business with these federal agencies. Fortunately, the government was able to catch this contractor, but unfortunately it was well after the contractor already had put at risk the security of thousands of federal employees.

The new A-76 fails to make any genuine improvements in contractor oversight to prevent Mellon Bank or security dog contracting frauds from happening again. I wish I could say with a straight face that lessons have been learned from contracting debacles of the past and OMB has applied these lessons to the new A-76. Unfortunately, I cannot. The new A-76 is business as usual when it comes to lack of accountability from contractors. Taxpayers and federal employees deserve, at a minimum, the same level of transparency and accountability from contractors as there is of the federal workforce.

Privatization Without Competition

While I was very concerned that a number of the issues NTEU raised were not addressed in the revised A-76 Circular, I was pleased that the new Circular supposedly eliminates the use of direct conversions, a flawed privatization process in which federal employees are not given an opportunity to compete in defense of their jobs. The revised Circular mandates that even those direct conversions underway under the old Circular, but not publicly announced before May 29, 2003, must be converted to streamlined or standard competitions within 30 days.

However, within days of the release of the revised Circular, we started hearing complaints about the new direct conversion rules from agencies that were performing such conversions prior to May 29 under the old Circular. And now, it is unclear what action, if any, OMB will take with agencies that are either bypassing the new rules altogether or seeking waivers to continue with direct conversions. Like so much in the A-76 Circular, OMB has

managed to create numerous loopholes to ensure that more government jobs are moved to the private sector as quickly as possible and with as little competition as possible.

Another loophole for agencies to circumvent OMB's stated goals for competition is the so-called "streamlined competition" process. Streamlined studies are nothing more than sugar-coated direct conversions, in which federal jobs are transferred to contractors without first giving federal employees an opportunity to put forward a competitive proposal. Much like the direct conversion provisions in the old A-76, the new streamlined rules emphasize speed in privatizing federal jobs at the expense of quality and costs.

Agencies can use the streamlined process if a government function involves fewer than 65 federal employees. Because of the rigid timeframe of 90 days in which agencies must complete the streamlined study, agencies have absolutely no incentive to reorganize their own employees in a way that will deliver higher quality services to the taxpayers at a lower cost. The shortened process will make it harder, if not impossible, for an in-house proposal to maximize new efficiencies and innovations, thereby creating a strong bias in favor of the outside contractor. This streamlined proposal runs counter to the recommendation of the Commercial Activities Panel to encourage the establishment of high-performing organizations and continuous improvements throughout the federal government.

Furthermore, under a streamlined study, no longer are contractors required to come in at the lowest cost with their bids in order to win the competition: contracts can now be awarded to contractors if their bids are "cost effective," a much weaker selection criteria to meet. And whereas in the past, the costs incurred by the taxpayers as a result of converting federal work to contractors were factored into the private sector bids, these costs are no longer included under a streamlined study. Finally, what limited rights employees have to challenge faulty award decisions under standard A-76 competitions have been completely eliminated under the streamlined process.

Privatization of Tax Collection Activities

It is no coincidence that at the same time OMB was revising A-76 and enforcing its privatization quotas, the IRS was developing a proposal with private debt collectors to privatize tax collection functions. This is even further evidence of the Administration's aggressive push to privatize government activities with or without competition and whether or not they are inherently governmental.

Tax collection has always been off limits to private contractors, since it has historically been deemed an inherently governmental function. Even under the new A-76's watered down definition of inherently governmental, the Administration acknowledges that tax collection is inherently governmental, and would require legislation before it could be privatized. But the fact that the Administration is even seeking legislative authority to outsource tax collection proves that if for some reason A-76 does not allow an agency to privatize a certain function, this Administration will find a way to privatize it.

Under this latest scheme, the IRS is proposing to pay private collection agencies on a commission basis to collect tax debt. The IRS wants to privatize these activities without first conducting a public-private competition to determine what is best for the taxpayers.

The IRS tax collection privatization proposal will cost the taxpayers $3.25 billion, more than ten times as much as it would cost the IRS to use its own employees. In a report submitted to the IRS Oversight Board last September, titled "Assessment of the IRS and the Tax System," former Commissioner Charles Rossotti made clear that with more resources to increase IRS staffing, the IRS will be able to close the compliance gap. The report found that if Congress were to appropriate an additional $296 million to hire more IRS compliance employees to focus on Field and Phone Accounts Receivable, the IRS could collect an additional $9.47 billion in known tax debts per year. This would be a $31 return for every dollar spent. Compare that to the contractor 25% commission scheme in which the contractors will be paid $3.25 billion to collect $13 billion: a three dollar return for every dollar spent. According to the Joint Committee on Taxation, the Administration's tax collection privatization proposal would bring in less than $1 billion over ten years at a cost of over $200 million. The IRS could bring in that amount in one year with just over $30 million in additional in-house enforcement resources.

The proposal to privatize tax collection is opposed by the Citizens for Tax Justice, the Consumer Federation of America, the Consumers Union, the National Consumer Law Center, and the National Consumers League. And concerns about the IRS's ability to manage debt collection contractors and adequately protect the rights and privacy of the American taxpayers have been raised by the General Accounting Office, the Treasury Inspector General for Tax Administration, the National Taxpayer Advocate, the Tax Executives Institute, the National Association of Enrolled Agents, and the Tax Section of the American Bar Association.

Two pilot projects were authorized by Congress to test private collection of tax debt for 1996 and 1997. The 1996 pilot was so unsuccessful that the 1997 project was cancelled. Contractors violated the Fair Debt Collection Practices Act (FDCPA) and did not protect the security of sensitive taxpayer information and the IRS officials charged with oversight of the contracts were ill-informed of the law and lax in their duties, failing to cancel the contracts of those in violation even though they had the authority to do so.

In addition to using prohibited collection techniques and not safeguarding confidential taxpayer information, the contractors did not bring in anywhere near the dollars they projected, millions of dollars were spent by the IRS to train the contractors, and millions were not collected by IRS employees because they were training the contractors instead of doing their jobs. (See GAO/GGD-97-129R and IRS Private Debt Collection Pilot Project, Final Report, Oct. 1997)

So while we are here today debating the nuances of OMB's troubling revisions to the A-76 Circular, in practice, agencies are seeking to privatize thousands of federal employee jobs without using A-76. Billions of taxpayer dollars are flying out of the Treasury coffers to pay private contractors to perform government functions that were never – and if OMB has its way, will never be – first subjected to public-private competition. Based on what NTEU sees happening at federal agencies, it is obvious that OMB's real motive behind the A-76 revisions is

to move more federal jobs to the private sector, regardless of cost, quality, and reliability of services.

Congress should require OMB to go back to the drawing board and develop an A-76 process that requires public-private competition before any government work is privatized, instead of one that allows agencies to pick and choose when they want to use a competitive process.

A Process That Costs the Taxpayers

After seeing all of the loopholes in A-76 to privatize federal jobs without competition, it is hard to believe that the A-76 process is actually supposed to be about competition. But even if agencies actually do conduct a standard A-76 public-private competition, OMB's changes tilt the playing field heavily in favor of contractors. First of all, agencies are required to complete standard A-76 competitions within twelve months, even though the most efficiently run A-76 studies have routinely taken 18 months or more to complete. And while OMB has gone to great pains to include every potential cost of federal employee performance of the work, the new A-76 arbitrarily excludes from the private sector bid legitimate costs of doing business with non-governmental entities. As an example of a windfall to the contractors in the costing process, the cost that must be incurred for a performance bond, if required by the solicitation, would be excluded from the contractor's price when compared against the agency bid. This is an actual cost of doing business with contractors that would not be incurred if federal employees performed the service: yet once again the contractors enjoy the benefit of having this cost excluded.

A Costly Alternative

NTEU is also concerned that the new A-76 Circular encourages agencies to move away from cost-based competitions to more subjective analyses that will lead to more outsourcing at higher costs to the taxpayers. The revised Circular now allows agencies to use the so-called "Tradeoff Source Selection Process" for selecting a winner in a competition between federal employees and contractors. This proposal is harmful not just to federal workers, but to American taxpayers who will wind up paying more than is necessary to get the job done and who will have less accountability as to how their tax dollars are spent.

The revisions to the Circular would, for the first time, allow contracting officers to use subjective determinations in public-private competitions. This would allow contracting officers to award contracts to a bidder that comes in with a more expensive bid than other bidders, but promises to perform work not requested by the agency. Introducing this tradeoff concept into public-private competitions would make fair comparisons between bids even more difficult, as it undermines the agency's ability to conduct an "apples-to-apples" comparison, an important aspect of any procurement decision.

OMB claims that the tradeoff process would be implemented on a limited basis only. However, the revised Circular gives agencies wide latitude to use this process. If the Administration is adamant about using this risky process, then it should first limit its application, so that we can find out whether or not it works for the taxpayers. Not until this process has been

tested and proven effective should the study be approved for government-wide use by the agencies.

I welcomed the Administration's effort to revise the OMB Circular A-76 as an excellent opportunity to improve the delivery of services to the taxpayers through fair competition on a truly level playing field for those competing. To my dismay, the new A-76 does nothing to advance the principles of increasing taxpayer value and leveling the playing field. Not only would federal employees suffer as a result of the revisions, but the taxpayers would as well. I therefore urge this committee to work to block the implementation of the revised A-76 until the countless problems I mentioned are resolved.

Thank you for giving me the opportunity to testify today.

December 19, 2002

The Honorable Angela Styles
Administrator
Office of Federal Procurement Policy
Office of Management and Budget
Eisenhower Executive Office Building
Washington, DC 20503

Re: Federal Register Notice Announcing Proposed Revisions to OMB Circular A-76

Dear Administrator Styles:

I am writing on behalf of the more than 150,000 federal employees represented by the National Treasury Employees Union (NTEU) to express our views on OMB's revised Circular A-76. Thank you for the opportunity to submit these comments.

At the outset, let me be clear that federal employees would welcome the opportunity to compete for their jobs on equal footing with the private contractors who seek to take over their work. Federal employees recognize that competition for work that is not inherently governmental may be in the best interests of the taxpaying public that they serve. And, the ultimate goal of the federal employees I represent, indeed of all federal employees, is to serve the taxpayers as best they can. Moreover, federal employees strongly believe that, if given the opportunity to compete, and if the competitions occur on a level playing field, they will win these competitions because nobody does a better job than the federal employees when given the tools and resources they need. Federal employees are capable, reliable, adaptable, and efficient, and they eagerly await the day when they can demonstrate their abilities through fair public-private competitions. Unfortunately, that day seems farther off now than ever.

I welcomed the Administration's effort to revise the OMB Circular A-76 as an excellent opportunity to increase competition for performance of commercial activities and create a truly level playing field for those competing. To my dismay, however, the drafted product--a complete overhaul of the Circular--does nothing to advance the principles of increasing taxpayer value and leveling the playing field. Not only would federal employees suffer as a result of the revisions, but the taxpayers would as well. I therefore urge you to revise the Circular to address the concerns discussed below.

901 E Street, N.W. • Suite 600 • Washington, D.C. 20004-2037 • (202) 783-4444

OMB's efforts at overhauling Circular A-76 go awry in six primary areas.

- The proposed Circular contains troubling provisions that would risk putting inherently governmental functions in the hands of unaccountable private sector companies by making it more difficult for an agency to classify a function as inherently governmental. See, Part I, at 3-4.

- The proposed Circular would broaden the current Circular's exemptions from the competitive process, allowing agencies greater flexibility to convert work directly to the private sector without competition. Moreover, it would require that competitions that cannot be completed within 12 months be short-circuited, with the work directly converted to the private sector. These provisions open the door to millions of taxpayer dollars being handed over to private contractors without any evidence that they can perform the work better and cheaper for the taxpayers than federal employees can. See, Part II, at 4-6.

- In those instances when public-private competitions are to occur, the proposed Circular would stack the deck against federal employees. The federal bidder would be required to include some very speculative costs in its bid, whereas the private sector bidders would benefit from several cost exclusion provisions that have no reasonable basis. These provisions would deprive the taxpayers of the benefit of a true competition used to determine the best option for performing the work. See, Part III, at 7-9.

- Federal employee rights following a decision to contract out work to the private sector would be unfairly and unreasonably limited under the proposed Circular. The employees' role in the competitive process would be seriously limited or, in the case of the administrative appeals process, entirely eliminated. In addition, the soft-landing provisions contained in the current Circular would be unfairly circumscribed. See, Part IV, at 9-12.

- The proposed Circular contains no new provisions for tracking contractor performance. Because the current requirements are not sufficient, the taxpayers would continue to be robbed of critical information about how their tax dollars are being spent. See, Part V, at 12-14.

- By proposing that the Circular govern all solicitations issued after January 1, 2003, OMB has failed to provide the public sufficient opportunity to consider fully these drastic changes and has not built in enough time to modify the revised Circular in response to any concerns raised by the public. See, Part VI, at 14.

Each of these shortcomings is discussed in more detail below.

I. COMMERCIAL VS. INHERENTLY GOVERNMENTAL FUNCTIONS

Preserving inherently governmental functions for performance by federal employees only is one of the cornerstones of federal procurement policy. Some work is just too "intimately related to the public interest" (see FAIR Act, § 5(2), codified as a note to 31 U.S.C. § 501) to permit performance by anyone other than a federal employee. For good reason, contractors historically have been trusted to perform only those functions that are truly "commercial" in nature. The proposed revisions to the Circular would undermine this important policy.

Currently, there are roughly 850,000 federal jobs listed on agencies' FAIR Act inventories as "commercial in nature" and therefore subject to being contracted out. Under the Administration's proposed revisions, that number would inevitably grow due to the presumption in the revised Circular that all government activities performed by federal employees would be considered "commercial in nature." Agencies would only be able to overcome this presumption by satisfying some undefined burden of formally justifying in writing that the jobs are inherently governmental.

The presumption is unreasonable. For many years, agencies have simply been asked to apply the definition of inherently governmental functions contained in the current Circular (and now codified in Section 5(2) of the FAIR Act, 31 U.S.C. § 501 note, and 48 C.F.R. § 2.101) to determine whether a particular function should be subject to contracting out. The agency's application of that definition can then be checked through the FAIR Act challenge mechanism. Creating a presumption that all government functions are commercial is flawed and unsupportable. Moreover, the presumption is contrary to the public interest because it would increase the likelihood that inherently governmental functions would be exposed to contracting out. Accordingly, the current practice of agencies applying the statutory definition to determine whether a function is inherently governmental should be maintained.

In addition to creating an improper presumption, the revised Circular also adopts a definition of inherently governmental functions that is at odds with the now-codified definition in the current Circular. It would raise the bar on what functions can be classified as inherently governmental by requiring that such functions involve "substantial official discretion," rather than the mere discretion required in the codified definition of the current version. OMB, however, lacks the authority to modify the codified definition of inherently governmental functions through issuance of a new Circular. Accordingly, the revised Circular should incorporate the current version's now-codified definition of inherently governmental functions.

A further flaw in the proposed process for designating a function as inherently governmental concerns the requirement that agencies draft written justifications for any such designations. Private contractors would then have an unfair advantage in attacking the agency's rationale through the FAIR Act appeals process, for federal employee unions would not have a comparable target when challenging agency designations of an activity as commercial. Justifications should only be required under the opposite

scenario, when an agency re-designates an inherently governmental activity as commercial. Such a radical about-face on a function previously deemed to be so intimately related to the operations of the government as to require federal employee performance should be fully explained to the public.

The revised Circular also would require inherently governmental activities to be included on the annual FAIR Act lists that agencies submit to OMB. In enacting the FAIR Act--a comprehensive scheme instructing agencies on the information they must report to OMB--Congress, of course, chose not to require inherently governmental activities to be included on these lists. OMB, therefore, oversteps its bounds by using the revisions to Circular A-76 to attempt to extend the FAIR Act requirements in this manner. If Congress had wanted inherently governmental functions to be included in the FAIR Act lists, it would have required that they be included when it enacted that statute.

OMB has further exacerbated the potential problems it would create with the revised Circular by failing to "grandfather" any of its provisions. If the revised Circular were to apply, as planned, to all solicitations issued on or after January 1, 2003, agencies would have insufficient time to evaluate their inventories under this new policy. FAIR lists, after all, are due to OMB by June 1, 2003. Because agency personnel must get the FAIR lists to their Department representatives well in advance of that date, work has likely already begun on this task. Asking agencies at this late stage in the process to identify, for the first time, all inherently governmental functions they perform is unreasonable. Accordingly, if this new standard is ultimately adopted, agencies should have until creation of the 2005 FAIR inventories to satisfy it.

The revised Circular also falls short of providing clarification for the agencies on which commercial inventory they should be using when identifying functions to be studied. Agencies are instructed to conduct competitions using functions that have been identified as commercial in nature. The problem under the current version of the Circular has been in determining from which of the agencies' "commercial in nature" list the functions should be drawn in defining the studies. Agencies have used inventories from prior years, while ignoring any exemption coding on current year inventories. A revised Circular A-76 should require agencies to secure inventories for current studies from the most current, published FAIR lists.

II. EXEMPTIONS THAT KEEP FEDERAL EMPLOYEES OUT OF THE COMPETITIVE PROCESS

A stated goal of the revised Circular is to subject all commercial activities to the forces of competition. See ¶ 4. I was, therefore, quite surprised to see that the Administration's revisions to the Circular would expand the circumstances under which work can be directly converted to the private sector without any competition whatsoever. Examples of this expansion are discussed below.

A. DIRECT CONVERSION RULES

The revised Circular would maintain the anti-competitive direct conversion regime of its predecessor. It adopts no measures aimed at ensuring that work is not contracted out to a contractor that will charge the agency more for the services. As long as the agency "believes" that it can receive a "fair and reasonable price" for the service, the work can be contracted out without competition. These contracting out decisions are made before a solicitation is even issued. Allowing for work to be contracted out when it can be performed at a better price and value by the federal workforce is an injustice. To protect the interests of the taxpayers, the revised Circular should require that some form of costing and analysis be performed before shipping work to the private sector.

B. NEW AND EXPANDING REQUIREMENTS

The revised Circular would also maintain the unfair prohibition on federal employee bids for new work (defined as a newly required need that is not being performed by federal employees). Any new work that is not inherently governmental, therefore, would be required to be performed by private contractors, whether or not federal employees could do a better job. This rule does a disservice to taxpayers. The federal workforce should be provided the opportunity to compete for this work to ensure that the taxpayers are getting the best deal.

The federal workforce should also not be precluded from competing for expansions of work (defined as a modernization, replacement, upgrade, or increase in workload of an existing agency performed activity that increases operating cost of the activity by 30 percent.) If a contractor is currently performing the work being considered for expansion, the revised Circular would not require the agency to allow the federal workforce to compete for that work. If, however, federal employees are performing the existing work, the entire function, or just the expansion if it can be segregated, would have to be re-competed. This disparate treatment is fundamentally unfair and serves no rational purpose. Federal employees should be shielded from competition at the expansion stage in the same manner as the private sector bidders are to be shielded, or they should be allowed to compete for expansions of work performed by the private sector.

C. 12-MONTH TIMEFRAME

The proposed revisions to the Circular would unfairly punish federal employees for their managers' failure to complete a competition within 12 months by requiring the work that was subject to the competition to be directly converted to the private sector. These unrealistic time constraints send the message to agencies that speed in privatizing federal jobs is more important than making sure that the taxpayer is getting the best quality at the lowest cost. Historically, even the most efficiently run A-76 studies have routinely taken 18 months or more to complete. No explanation is provided in the revised Circular for how agencies would now be able to complete the competitions in two-thirds the time.

The apparent rationale for this strict deadline is OMB's belief, as voiced recently by one of its officials, that an agency is not equipped to perform the work that was the subject of the competition if it cannot complete the competition within 12 months. There is no basis, however, for comparing the time it takes to conduct a competition to the agency's ability to carry out its core mission.

To the extent competitions take longer than is reasonable, the solution is not to punish the front-line employees who have nothing to do with the delay. Rather, OMB should address those situations on a case-by-case basis. Its proposed approach would result in studies that are based upon little or no preplanning, solicitations based upon poorly written Performance Work Statements, bids that give no consideration to innovation and creativity, source selections riddled with costing and procedural errors, and the issuance of contracts that do not meet the needs of the agency, regardless of who wins. Ultimately, it is the taxpayers who would suffer from this unreasonably strict deadline, as agencies would be stuck with contracts that do not serve their needs.

It is further unreasonable for the revised Circular not to include any phase-in opportunity for the implementation of the 12-month timeframe. Under its terms, the revised Circular would apply to any new solicitations issued on or after January 1, 2003. This means that the new rules would apply retroactively to competition studies that are already underway, but for which no solicitation has been issued. Applying the new 12-month rule to those studies that are already underway would have a devastating effect on the studies themselves. Those studies that began under one set of rules and standards (with an 18-month to 36-month completion timeframe) would now be subjected to a new standard. Those competitions would probably not be completed within the 12-month timeframe for the simple reason that the agencies would not be able to adjust their milestones mid-study. The penalty for such non-compliance--direct conversion--would once again rob the taxpayers of the benefits of a competition and the federal employees of a fair opportunity to compete for their jobs.

OMB should eliminate all arbitrary timeframes from its revisions to the Circular (i.e., the 8-month timeframe from announcement to solicitation, the 4-month timeframe form solicitation and announcement of award, and the 15-day timeframe in direct conversion to do a business case study). If a timeframe is established, it should be advisory, based upon sustainable evidence, and it should only apply to new studies (those that are in the pre-planning stages or earlier, which have not already been announced to the public). Any evidence of failure to proceed through a study efficiently and effectively should be addressed on a case-by-case basis, and at no time should the frontline employees or the taxpayers be punished for delays in the procurement or study process.

III. STACKING THE DECK IN FAVOR OF PRIVATE CONTRACTORS

A. CONTRACTOR-FAVORED PROVISIONS

There are many provisions in the revisions to the Circular that are obviously one-sided in favor of private contractors. An example appears at B-4, where agencies are instructed to conduct research to determine how activities should be grouped "consistent with market and industry structure." Government needs, apparently, do not rate when it comes to such considerations.

Moreover, in several places in the revised Circular, agencies are instructed to identify savings that arise from the competition. See e.g., B-5. Nowhere are they instructed to keep track of losses or cost overruns. The head of the agency is merely required to "monitor" actual cost of performance. See B-15.

Another one-sided provision concerns new steps an agency would have to take when no private sector bidder comes forward in response to a solicitation. See B-10. The presumption is that the agency erred in the solicitation process and needs to consult with private sector companies to explore ways to revise the solicitation so that the private companies will bid for the work. In reality, the work may simply be undesirable to the private sector. This requirement would put pressure on the agencies to revise their solicitations to reflect private business needs, rather than the agency's needs.

Yet another example of contractor bias is the latitude given to the contracting officer to question whether sufficient resources have been included in the MEO to perform the work. See B-11. No parallel provision exists for scrutinizing private sector bid to ensure that they have included appropriate costs for all needed resources.

When a contract is terminated, the work still needs to be performed until the next service provider is selected. Amazingly and without explanation, the revised Circular would expressly prohibit federal employees from performing the work in the interim. See id.

There are also several provisions that would stack the deck in favor of the private contractor in the cost comparison process prescribed by the revised Circular. For example, the cost of a performance bond, if required, would not be included in the private contractors' bids. See B-7. Costs associated with obtaining security clearances would also not be included in the private contractors' bids. See id. Also excluded from the private contractors' bids would be the "one-time conversion costs," such as Separation Incentive Pay and the cost of performing an Environmental Baseline Survey. See E-14. These are all extra costs of doing business with private contractors; it is a disservice to taxpayers to exclude them from the private sector bids.

A further unreasonable benefit given to the private sector bidder is that they would get a credit to account for increased tax revenue that the government may realize as a result of privatizing the function. See E-15. This credit would be entirely

speculative, especially in light of the fact that many companies that do business with the federal government incorporate in tax-haven countries to avoid domestic taxation.

On the other hand, every potential and assumed cost of agency performance of the work is meticulously outlined in the revised Circular. See E-4 to E-11, E-14 to E-15. These would include some dubious costs that appear to be aimed not at fairness, but at ratcheting up the federal employee's bottom-line. For instance, the revised Circular (at E-14) would require the Agency Tender to include in its bid the one-time costs incurred when the government transfers work from federal employees to the private sector. This is a cost of doing work with the contractor, and should be included in the contractor's bid only.

The Agency Tender would also have to include as a cost the potential amount of money the government could gain in selling assets in connection with the work being taken over by a private contractor. See id. This "gain" would be entirely speculative and is also not related at all to the costs of the agency employees performing the work.

When competing for new requirements or expansion of existing requirements, the private sector bidders would be treated as the "incumbent." See E-15. This means that the federal employees would have to show a savings of 10% of personnel costs or $10 million in order to perform the work in-house. Since this is new work, and by definition, there is no incumbent, placing the burden of exceeding the minimal differential on the federal employees is entirely nonsensical.

In short, rather than creating a level playing field on which federal employees and private sector bidders can compete, the revised Circular would rig competitions in favor of private sector bidders by shifting to federal employees costs not related to their performance of the work while excluding from the private sector bid some very legitimate costs of doing business with a contractor.

B. NO STANDARDS OR ACTUAL COSTS USED FOR THE 50 AND UNDER PROCEDURE

The proposed procedure applicable to functions involving 50 or fewer employees borrows much from the "Streamlined" studies permitted under the current Circular. This process, however, still fails to provide any clarity on some very difficult issues. Under the revisions, the Contracting Officer would be tasked with searching for and finding "comparable contracts," though no guidance is provided as to where to find those contracts. Under the streamlined approach in the current Circular, agencies have struggled to find comparable contracts, especially when the function being considered is not one that is typically contracted out across the federal government. Thus, they have been left with comparing the existing agency costs with contracts that are not comparable (e.g., from other geographic areas or old contacts).

This process rests on the flawed assumption that past contracts are accurate predictors for future costs. The amount the agency actually pays to a contractor,

however, is often much higher than that indicated by a contract comparison. Indeed, the "comparable contract" that is used to justify contracting out the work may not even bid on the actual solicitation. Furthermore, the winning bidder may in fact charge more for the services than the federal workforce, resulting in a higher cost of the services for the taxpayer. Before any federal employee is displaced, OMB should require cost comparisons to be performed using actual costs and real bidders for the work.

C. INHERENT FLAWS IN THE NEW BEST VALUE PROCESS

The revisions to the Circular would, for the first time, allow contracting officers to use subjective "best value" determinations in public-private competitions for commercial activities to award contracts through the so-called "integrated process." This would allow contracting officers to award contracts to a bidder that comes in above other bidders, but promises to perform work in addition to that requested by the agency. Introducing this best value concept into public-private competitions would make fair comparisons between bids more difficult. It undermines the agency's ability to conduct an "apples-to-apples" comparison, an important aspect of any procurement decision.

OMB claims that the integrated process would be implemented on a limited basis only. While not all competitions would be subject to the integrated process, a substantial number would. Under the proposed revisions, agencies would use this untested process on competitive sourcing studies involving Information Technology (IT) functions. There are a disproportionately large number of IT functions listed on the FAIR Act lists. It is likely, therefore, that a larger number of FTEs under study under the revised Circular would be subject to this integrated process. Before embarking on this new approach in a broad-based manner, OMB should require that a limited OMB-approved and controlled study be conducted using the integrated process. Not until this process has been tested and proven effective should the study be approved for government-wide use by the agencies, even on IT jobs.

The integrated process should also be revised to account for the inequity inherent in the past practice component. The federal employees bidding on the work would be considered a new organization (i.e., the MEO), and would not have any past practice to be considered. This gives the private vendor an unfair advantage. In order to ensure fairness and consistency in the process, past practice should be a component only of comparisons among private sector bids; it should not be used to disadvantage the federal employee bid.

IV. CIRCUMSCRIBED FEDERAL EMPLOYEE RIGHTS

A. ELIMINATION OF THE EMPLOYEES' RIGHT TO BE INFORMED AND MEANINGFULLY INVOLVED

Under the current Circular, agencies are required to provide affected employees a meaningful opportunity to participate fully in the competition, including development of the PWS, the Management Plan (including the MEO), and the in-house and contractor

cost estimates. This requirement would be eliminated under the revised Circular. While the revised Circular would not rule out employee participation, it would not ensure it. The revised Circular would only require the agency to include "technical and functional" experts on these teams. The frontline employees would presumably qualify as functional experts, but others will too, and the agencies would not be required under the new language to include the frontline employees among their experts. This change could have a devastating effect on the outcome of the process. If frontline employees are excluded from the process, the level of distrust and contempt for the process will obviously elevate. Additionally, the quality and efficiency of the study will be diminished.

The current Circular recognizes the importance of involving and supporting the frontline employees most affected by the competition. No persuasive reason exists for eliminating this recognition. The frontline employees know the most about the work they perform, and they should be involved in the process at every step. That is, they should have an opportunity to participate fully on the PWS team, the Management Plan team, and Costing teams. Moreover, the agencies should continue to be required to provide the frontline employees with A-76 training so that the employees can continue to be effective members of these teams. Finally, the agencies should be required to keep the frontline employees informed at every major milestone in the study. This should include a requirement that agencies brief all affected employees on a regular basis (i.e., monthly and at every major milestone). Anything short of full and meaningful involvement of the frontline employees in this process shortchanges the taxpayers who would benefit from their expertise.

B. ADMINISTRATIVE APPEAL PROCESS

The administrative appeals process in the revised Circular would be available only to "directly interested parties." The revised Circular would exclude federal employees and their unions from this definition, vesting exclusive authority for filing appeals on behalf of the agency bidder in the hands of the "Agency Tender Officer" (ATO). The ATO would be, by definition, an inherently governmental position. Accordingly, the ATO would lack the incentive to take a close look at the agency's actions that the frontline employees who stand to lose their jobs have. Assigning appeal authority to this single, disinterested entity would undermine the important purposes of the appeals process.

The administrative appeal process is the agency's last opportunity to correct any wrongdoings before GAO or the courts get involved in the contracting decision, a time-consuming and costly process. Indeed, since these other avenues are not available to federal employees, it is the one chance under the current regime where those with the most knowledge about the work being competed can point out flaws that rob the taxpayers of the true benefit of the competition. It would, therefore, be bad policy to eliminate this avenue of review for federal employees.

The revised Circular's further limitations on the appeals process are also unwise. It would shorten the time period for filing an appeal from 20 days to 10 days. This is not

enough time to allow for a full consideration of the issues likely to be addressed in an appeal. Rather than shrinking the timeframe, the new Circular should increase it to 30 days.

The revised Circular would also require that all interested parties file whatever appeals they may think they have by this 10-day deadline. Thus, it would require all interested parties to anticipate all possible outcomes from all possible challenges, and be able to raise concerns about those possible outcomes (within 10 days) before they are even submitted by other parties, considered by the agency, and decided by the agency. This one-shot appeals approach is unrealistic and unfair, and it would unnecessarily complicate the appeals process, delaying ultimate resolution of every competitive sourcing decision.

A final problem with the revised Circular's revised appeals process concerns implementation of agency decisions while appeals are still pending. Following completion of the administrative appeal process, the A-76 study may still be subject to additional scrutiny from outside of the agency. "Interested parties" can challenge the study decisions through the bid protest process. Such a protest could result in a re-competition or even a different winner. With so many possible outcomes, implementation of any tentative study results should be held in abeyance, pending resolution of all legal challenges. Frontline employees should not be displaced, agency work and systems should not undergo transition, and expenditures should not be made until all decisions are final and binding. Any other approach would risk wasting substantial amounts of taxpayer dollars.

C. STANDING

The revised Circular takes no steps to ensure that federal employees and their unions have standing to protest agency decisions before GAO and the courts. Unfairness in the competitive process not only disserves the employees who suffer from it, but also the taxpayers, who will only reap savings if a competition is fair and legal. Accordingly, the revised Circular should do as much as possible to guarantee that those with the most interest in the outcome of the competition--the frontline federal employees--have sufficient avenues for bringing unfairness to light.

D. AGENCIES NO LONGER REQUIRED TO PROVIDE SOFT LANDINGS FOR THE ADVERSELY AFFECTED EMPLOYEES

The current Circular requires agencies to "exert maximum effort to find available positions for federal employees adversely affected by conversion decisions." The revised Circular would eliminate this requirement. There is no question that federal employees will lose their jobs as a result of public-private competitions conducted under the revised Circular as written. Eliminating the agencies' obligation to take into consideration the needs of those who have devoted their lives to federal service would be a slap in the face to these hard-working men and women. OMB should reinstate the requirement that agencies provide these adversely impacted public servants with more than just a RIF

notice. OMB should recognize that, to the extent reasonably possible, the agencies should find these employees other federal positions, provide retraining and job placement assistance, and offer all of the other soft landing provisions that are included in the current Circular.

E. RIGHT OF FIRST REFUSAL

The revisions to the Circular would unreasonably limit the "right-of-first refusal" for federal employees who are displaced as a result of a competition. First, the revised Circular would eliminate the right entirely when a contract is taken away from an agency operating under an interservice support agreement (ISSA). Employees working for ISSAs are federal employees from one agency who are providing services to another agency. The cost of their service is reimbursed to their home agency.

Because employees working under ISSAs are federal employees who stand to lose their jobs as a result of a competition, they should receive the same rights and benefits as other federal government employees. It is unreasonable to exempt these employees from the right of first refusal simply because their home agency had historically received a fee from the customer for their service.

The revisions to the Circular would also limit the positions with the private sector bidder for which affected employees would be eligible to exercise their first-refusal rights. Under the current Circular, if an adversely affected employee qualifies for a vacancy created by the new contractor, the employee would have a right to that position. The proposed revisions to the Circular would limit that right to non-managerial positions only. There is no reason to eliminate available vacancies if the federal employee meets the vendor's qualifications. OMB should ensure that all available jobs remain accessible to the displaced federal employee.

V. TRACKING CONTRACTOR PERFORMANCE

A. NO OVERSIGHT OF CONTRACTORS

The revisions to the Circular would not make a single change to improve oversight of contractors. Oversight is particularly important now, as the Administration requires that more and more functions be opened to competition. Inadequate measures are in place to determine how much the contractors' work costs the taxpayers, how the actual costs of the contract compare to what the contractors originally promised, whether the contractors delivering the services they promised to deliver within the timeframes they promised, and whether the services are being delivered at an acceptable level of quality. Agencies and the taxpayers did not know this information before the revised A-76 was released, and they would still be in the dark under the new A-76.

If the revised Circular is to require agencies to redouble their time and resources to produce inventories of the size and makeup of the entire federal workforce, including those performing both commercial and inherently governmental functions, then agencies

should also be required to publish inventories of the contractor workforce that is performing the work of the agency. Agencies should be required to implement systems to track whether current contracting efforts are saving money, whether contractors are delivering services on-time, at the quality and efficiency levels that the agency requires, and at the cost that the contractor promised. When a contractor is not living up to its end of the deal, the government must have the realistic capability to bring the work back in-house. All of this information should be reported on an annual basis, along with the agency's annual inventories. The government owes this accountability to the taxpayers who fund it.

Once a contractor gets a contract, that work is out the door and rarely--if ever--scrutinized again. For example, Mellon Bank, a contractor hired by the Internal Revenue Service, lost, shredded, or removed 70,000 taxpayer checks worth $1.2 billion in revenues for the U.S. Treasury. If agencies had had better tracking systems and more contract oversight staff, the losses to the taxpayers resulting from the Mellon contracting fiasco could have been halted much sooner. Taxpayers and federal employees deserve, at a minimum, the same level of transparency and accountability from contractors as there is of the federal workforce.

B. BUSINESS AS USUAL FOR CONTRACTORS

OMB's revised Circular would continue to permit contracting for government work with unreliable private companies that violate federal laws. Nothing in the revised Circular would prevent agencies from contracting with companies that repeatedly violate criminal or civil laws. Under the revisions, contractors guilty of antitrust violations, embezzlement, or bribery would still be able to win lucrative federal contracts. As the amount of money spent on contracts increases under the Administration's new initiative, contractors that violate environmental, safety and health, labor, civil rights or other laws will get a bigger share of taxpayer dollars each year. This miscarriage of justice should be remedied in the revised Circular.

The revisions would also do nothing to address the issue of agencies awarding contracts to companies that turn their backs on our nation and reincorporate in Bermuda and other tax haven countries to avoid paying taxes in the United States. The General Accounting Office estimates that in fiscal year 2001 nearly $3 billion worth of contracts for U.S. government services were awarded to four government contractors that are incorporated overseas in tax haven countries. With more government work up for grabs for contractors, more taxpayer dollars will go to these and other expatriates.

Similarly, nothing in the revisions concerns the untenable situation some agencies find themselves in when entering into contracts with bankrupt companies such as WorldCom. Despite the fact that in July 2002 WorldCom filed the largest bankruptcy in U.S. history, the General Services Administration recently renewed an estimated $11 billion contract with WorldCom. OMB has included nothing that would prevent agencies from rolling the dice with billions of taxpayer dollars in contract awards to companies like WorldCom, which are barely here today, and could be out of business tomorrow.

Under OMB's revisions, it would be business as usual, and then some, for contractors. They could continue to collect their inflated contract payments from the government, even if they move overseas, file for bankruptcy, illegally shut out union workforces, pollute our environment, or break other laws. A-76 should be revised so that unpatriotic, unreliable, and lawbreaking contractors are prohibited from being awarded lucrative government contracts.

VI. IMPLEMENTATION OF REVISED PROCESS

As evidenced by these extensive comments, the changes to the procurement policy announced by OMB in its revisions to the Circular are far-reaching. Thus, I am disappointed that OMB has proposed to make the new Circular effective for all solicitations issued as of January 1, 2003. OMB has allowed a mere 30 days for federal employees, unions, and other members of the public to comment on these drastic revisions to the Circular, and left itself almost no time to consider the public's comments. This disregard for input by federal employees and the public leaves the impression that this Administration cares more about rushing to privatize the government workforce than developing a procurement process that is fair and effective in delivering high quality services to the taxpayers. To allow for a full consideration of the many issues raised in the revised Circular and in the public's response to those changes, OMB should delay the Circular's implementation date by at least 6 months.

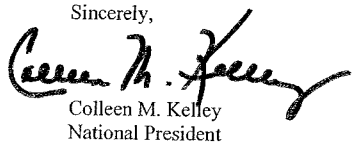
As written, the revised Circular would have an extremely adverse impact on studies that are currently underway. OMB has specified that the revised Circular would apply to all studies that have not already reached the stage where a solicitation has been posted for bid. Those studies would be expected to abide by the new rules, even though they are well underway under the current regime. This would have a disastrous impact on these studies, particularly when the Circular's rigid 12-month limit on competitions is applied. Under the current A-76 rules, agencies were given 18 to 36 months to complete those studies, taking into consideration planning time, market research, and bidder comment periods. Those same responsibly planned competitions would be short-circuited by retroactive implementation of the revised Circular, resulting in direct conversion of the work to the private sector without determining whether private sector performance will save any money. The studies that have already begun and are operating under the current Circular should be allowed to continue under its rules. The revisions should only apply to new studies, defined as those that are in the pre-planning stages or earlier that have not already been announced to the public.

CONCLUSION

OMB's revisions to the Circular represent an important moment in federal procurement history. Unfortunately, OMB has chosen to propose a system whose only goal appears to be to help private contractors land lucrative government contracts at the expense of federal employees. The revisions represent a missed opportunity to fix a broken system. I hope that OMB will seriously consider the comments set forth herein

and delay implementation of any new Circular until it can adjust the rules along the lines I have suggested. I fear that implementing the Circular as revised will have grave consequences for American taxpayers and the federal employees who do so much every day to serve their country honorably. I would be happy to discuss these comments with you further.

Sincerely,



Colleen M. Kelley
National President

Competition with Oversight, Responsibility, and Equity (CORE) Proposal

The authors of the CORE Proposal have attempted to draft a set of proposals that supports the mission statement and the ten principles of the Commercial Activities Panel (CAP) and that should command the support of a solid majority of the members of the Commercial Activities Panel (CAP). We have undertaken an effort to accommodate the concerns of other panelists, including those who approach service contracting issues from completely different perspectives.

This "good government" proposal ensures full and fair public-private competition, tracks the true costs of contracting activities, empowers agencies to engage in make-or-buy decisions that are routine in the private sector, and establishes an equitable appellate process, while still retaining sufficient management discretion. We believe that the CORE Proposal makes improvements in the current system to better serve the taxpayers, while satisfying the needs of agencies, government employees, and government contractors.

COMPETITION

1. Proposal:

Absent compelling and documented national security rationales, a public-private competition should always be held before work performed by federal employees is transferred to contractors.

Details:
If an agency wishes to replace federal employees with a contractor, then it should undertake a full and fair public-private competition process. Conversions without competitions are unfair to the workers involved and poorly serve the interests of taxpayers and those who depend on federal agencies for important services, including our nation's warfighters.

2. Proposal:

A limited and equitable pilot project should be developed to experiment with new procedures for carrying out public-private cost comparisons as a means of assessing the viability of alternatives to the current A-76 system.

Details:

Any public-private competition process is bound to generate controversy because federal employee jobs and contractor profits are at stake. OMB Circular A-76 has been the object of considerable criticism based almost exclusively on how it is implemented rather than a fundamental disagreement with the basic A-76 process. However, the circular remains the only tested and proven competition process. The circular allows for qualitative improvements in the delivery of services, while protecting the interests of taxpayers by ensuring that ultimately, decisions are based on cost. While agencies should always strive to reform and improve the process, it would be ill advised to abolish OMB Circular A-76, or even relegate it to a secondary role, in favor of an untried and untested replacement.

Consequently, before instituting untested government-wide changes, OMB should establish a limited pilot project to examine the various alternatives to OMB Circular A-76, including bid-to-goal, dollarization, "best value," and low-cost/technical tradeoff on work performed by federal employees, new work, and work performed by contractors. Alternatives to A-76 procedures should ideally include requirements to evaluate bids on the basis of cost, allow a cost differential for an incumbent service provider, ensure that an incumbent has the opportunity to reformulate its bid in response to a challenger's submission that exceeds the original Statement of Work, allow federal employees to compete as part of a most efficient organization, and utilize OMB Circular A-76 Handbook guidance with respect to the calculation of in-house personnel costs, in-house non-personnel costs, and in-house overhead costs.

The alternatives explored in the pilot project should be evaluated by an impartial independent review panel. Should any of these variations or alternatives prove to be consistently more efficient, expeditious, and equitable, consideration should be given to using these alternatives in more situations. Given that the proposal endorsed by GAO and private contractors is no more expeditious than OMB Circular A-76, time will not be lost waiting for the impartial review of a tested limited pilot project.

3. Proposal:

Public-private competitions must be used in an equitable manner.

Details:
To the extent it is used by an agency, public-private competition should be used in an equitable manner in order to increase agency efficiency, rather than as a mechanism to replace one workforce with another. To the same degree that public-private competition is appropriate for commercial work performed by federal employees, it is appropriate for new government work designated as commercial, and for government work performed by contractors.

This proposal does not suggest that all government work being performed by contractors or all new work be immediately subject to public-private competition. Each year agencies

should subject to public-private competition approximately the same number of contractor jobs and federal employee jobs. For example, if in a given year an agency subjects 100 federal employee jobs to competition, then approximately 100 contractor jobs should be subject to competition that year. If necessary, agencies should be allowed to phase in compliance with this requirement over several years and should be encouraged to use, in addition to OMB Circular A-76, variations of, or alternatives to, the circular within the guidelines described above if it is clear such approaches would be expeditious and equitable. Agencies would retain the discretion to determine how many, and which contractor jobs should be subject to public-private competition. The equity requirement could be waived for compelling national security reasons.

With respect to new work, federal employees should be allowed to compete annually for at least half of an agency's new work, measured in dollars. Again, agencies should be allowed to phase in their compliance with this requirement over several years and should be encouraged to use, in addition to OMB Circular A-76, variations of or alternatives to the circular based on the determination of the impartial independent review panel. Agencies would retain the discretion both to determine which new work would be subject to public-private competition and waive that requirement for compelling and documented reasons of national security.

OVERSIGHT

1. Proposal:

Agencies should implement reliable systems to track the costs and quality of services provided to the government by contractors.

Details:
Agency managers and policymakers alike need reliable and comprehensive methods for tracking the cost and size of the contractor workforce and the quality of the work they perform. Detailed information about federal employees—who they are, what they do, and how much they cost—is meticulously collected and compiled, particularly through the FAIR Act. Taxpayers, government employees, agency managers, warfighters, contractors, and policymakers, would be better served if that same information were kept about government work performed by the private sector. Agencies should implement the use of three complementary mechanisms for tracking service contracting efforts, overall as well as for specific contracts, both in the short-term as well as the long-term.

a.) Establishment of the comprehensive cost-tracking requirements in the Truthfulness, Responsibility, and Accountability in Contracting (TRAC) Act (H.R. 721, S. 1152);

b.) Rigorous application of Cost Accounting Standards (CAS);

c.) Government-wide adoption of the Army contractor inventory.

2. **Proposal:**

Strengthen the civilian acquisition workforce.

Details:
The size of the acquisition workforce should be increased, the acquisition workforce should receive in-house training in cost-based service contract administration, and the contracting out of contract administration work should be halted.

3. **Proposal:**

Establish an equitable appeals process.

Details:
Federal employees and their union representatives should be given rights to appeal service contracting decisions to the Court of Federal Claims and to the GAO.

RESPONSIBILITY

1. **Proposal:**

Agencies should be prohibited from using arbitrary conversion, competition, and privatization quotas.

Details:
Arbitrary, one-size-fits-all quotas for contracting out hinder agencies' abilities to achieve efficiencies and carry out their missions. Moreover, contracting out quotas encourage agencies to give work performed by federal employees to contractors without public-private competition, a practice that does nothing to promote efficiency or ensure cost savings.

2. **Proposal:**

Agencies should be prohibited from using arbitrary personnel ceilings.

Details:
Agencies should be allowed to manage their workforce by budgets and workloads. Like contractors, agencies should be allowed to "staff up" to assume additional responsibilities, whether that is new work or work that had previously been performed by contractors. Agencies should be allowed to engage in the same make-or-buy decision-making process undertaken by private sector firms, including contractors, every day.

Additionally, agencies should not impose personnel ceilings on contractors.

EQUITY

1. **Proposal:**

Service contracting should not be undertaken to replace working and middle class Americans in the federal workforce with a poorly paid and poorly benefited contingent workforce. Service contracting should be undertaken only when it clearly is in the best interest of the American taxpayers and those who depend on federal agencies like DoD for important services, including our nation's warfighters.

ADDITIONAL PROPOSAL:

1. **Proposal**:

Take steps to encourage high-performing organizations (HPOs) and continuous improvement throughout the federal government.

Details:
OMB should continue to develop a proposal for implementing a pilot program embracing the concepts of Panel Chairman David Walker's model for High-Performance Organizations (HPOs).

The concept assumes that a successful HPO would be able to operate almost as a virtual corporation, in which employees have the right to bargain over pay and benefits. Much like successful corporations, cost savings and increased performance will only be realized through real labor/management cooperation. Additionally, the pilot program must include an iron-clad commitment for a meaningful financial investment in the program, employee training and technical assistance, financial incentives for federal employees who meet their performance goals, and exemptions from competition for HPOs meeting their performance goals.

Questions for the Record
Government Reform Committee
Hearing on
Competitive Sourcing and
Office of Management and Budget's Circular A-76
June 26, 2003

Question. Benefits to taxpayers. On page 6 of your written statements, you state, "the Department fully supports OMB's new Circular." On page 7, you state, "This initiative has its challenges, but we believe our approach ensures fairness, effectiveness, and efficiency." Has DOI estimated the benefits (including potential dollar savings) to the taxpayers from this policy change?

Answer. Overall, the Department of the Interior (Department) believes that taxpayers will greatly benefit from the changes made by the Administration to Circular A-76; we expect that federal agencies using the new processes will realize tremendous efficiencies and cost savings from these competitive reviews. Some of the new flexibilities offered by the Circular were developed and tested by the Department, with OMB's approval, prior to the implementation of the revised Circular. These alternative approaches allow the Department to streamline its competition process and to improve the odds that competition would, in fact, produce better value for the agency's customers and the taxpayer. Based on our experience, we believe that most agencies will find that their opportunities to reduce the cost of studies and to increase net benefits to the taxpayer will be greatly enhanced under the new Circular. The following are three examples of the flexibility previously used by the Department and now available to all agencies under the new Circular:

First, OMB allowed the Department to do an "Express Review" study for less than 10 full time equivalent employees (FTEs), instead of simply doing either a direct conversion or performing a much more expensive standard or streamlined study on these small units. Express Review involves an economic comparison between public sector costs and private sector prices and, therefore, eliminates the chance that a function might be contracted out in a way that does not make economic sense.

Second, in those instances where managers did decide to use direct conversions (when still allowed under the old Circular), the Department required managers to document the economic basis for their decision. This documentation was not required under the old Circular, but we thought it made good business sense and was more fair to our employees. This notion of economic analysis in reviews of small work units is contained in the new Circular.

Third, before the new Circular was published, OMB had allowed the Department to perform what we called a "simplified cost comparison," which essentially was a streamlined study coupled with an employee "Most Efficient Organization" option. This method allowed employees to be more competitive by reengineering their work for

functions of 11-65 FTEs. This also virtually guaranteed the taxpayer more cost-effective service, regardless of who won the competition. Again, this approach is allowed under the new Circular.

In all three instances, our approach did a better job of both protecting our employees and improving service delivery for our customers and the taxpayers.

Since we are just beginning to get practical experience with competitive sourcing reviews at the Department, we are still collecting information on the overall economic value of competitive sourcing based on the very few studies that have been completed to date. We are encouraged by the longstanding experience of others, including local government. For example, the City of Houston achieved a 43 percent savings from previous costs in operating its water purification plant. A private contractor won the competition and achieved cost savings by offering entirely new technology. San Diego's Fire Department regained the job of providing emergency medical responses to teaming with a private provider in a bid that saved the City $7 million over 5 years. The experiences of state and local governments and the Department of Defense show that savings of 30 percent often result from competition.

Question Involuntary Separations. On page 2 of your written statement, you state, "To date, of the FTEs that we have analyzed, no involuntary separations have been necessary in the Department." Do you anticipate that this "good news" for Federal employees will continue?

Answer. We are working very hard to continue to protect our employees as we move ahead with competitive sourcing reviews. We are confident that, Our employees will be highly competitive in competitions. Historically, the government has won more than half of all public-private competitions, and the overall percentage of involuntary separations is small. In those cases where there are impacts, we will take all reasonable steps to help any affected employee remain employed at the Department, if that is their preference. We are aware that roughly 20 percent of our employees will be eligible to retire over the next five years, and those vacancies will help us manage any potential impacts of competitive sourcing. We have also recently requested from the Office of Personnel Management authority to utilize voluntary separation incentive payments and voluntary early retirements, in a very targeted way, to help us assist any employees who may be affected.